

86-754①

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

ROYAL CENTER, INC.,

Petitioner,

vs.

LOCAL JOINT EXECUTIVE BOARD OF
LAS VEGAS, CULINARY WORKERS UNION,
LOCAL 226, and BARTENDERS UNION, LOCAL 165,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. May a court properly refer to arbitration the determination of whether a non-party to a collective bargaining agreement may be bound thereto as an "alter ego" of a signatory employer.

B. May a court properly refer to arbitration the determination of whether or not a collective bargaining agreement survived a bona-fide closure of business and cessation of operations.

C. May a court properly compel arbitration of a claim that the seller and purchaser of business assets are "alter egos" where the National Labor Relations Board has by written decision, upheld upon appeal to the General Counsel, found that the factual allegations, if proven, did not establish an "alter ego" relationship, did not constitute a violation of the National Labor Relations Act, and did not warrant issuance of a complaint.

PARTIES TO THE PROCEEDINGS

There were no parties to the proceedings in the United States Court of Appeals for the Ninth Circuit other than those set forth in the caption of the case before this Court.

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No. _____

**In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986**

ROYAL CENTER, INC.,

Petitioner,

vs.

**LOCAL JOINT EXECUTIVE BOARD OF
LAS VEGAS, CULINARY WORKERS UNION,
LOCAL 226, and BARTENDERS UNION,
LOCAL 165,**

Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioner, Royal Center, Inc.,¹ respectfully prays that a writ of certiorari issue to review the judgment and opinion of United States Court of Appeals for the Ninth Circuit, heretofore entered on August 12, 1986 after remand of this case from the United States Supreme Court.

I.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit on remand from the United States Supreme Court is reported at 796 F.2d 1159 (9th Cir. 1986), and is reproduced in the Appendix at pp. A-1 - A-11. The Order of the United States Supreme Court

¹ Royal Center, Inc. is a wholly-owned subsidiary of the Horn and Hardart Company.

granting Certiorari and concurrently vacating the prior opinion of the Ninth Circuit is reported at 106 S.Ct. 1627 (1986) and is reproduced in the Appendix at p. B-1 . The vacated Order and Opinion of the United States Court of Appeals for the Ninth Circuit upon rehearing is reported at 754 F.2d 835 (9th Cir. 1985), and is reproduced in the Appendix at pp. C-1 - C-13. The Findings of Fact, Conclusions of Law and Judgment of the United States District Court for the District of Nevada are unreported, and are reproduced in the Appendix at pp. D-1 - D-9. The Statement of Reason for Dismissal by the Regional Director of Region 31 of the National Labor Relations Board is unreported, and is reproduced in the Appendix at pp. E-1 - E-4. The denial of appeal to the General Counsel for the National Labor Relations Board is unreported, and is reproduced in the Appendix at pp. F-1 - F-2.

II.

JURISDICTION

The Judgment of the United States Court of Appeals for the Ninth Circuit upon remand from this Court was entered on August 12, 1986. Jurisdiction before this Court is invoked pursuant to Title 28, United States Code, Section 1254(1). Jurisdiction before the District Court was invoked pursuant to Title 29, United States Code, Section 185.

III.

STATUTES INVOLVED²

Section 2(9) of the National Labor Relations Act, as amended by the Labor-Management Relations Act of 1947, 29 U.S.C. §152(9).

Section 3(d) of the National Labor Relations Act, as amended by the Labor-Management Relations Act of 1947, 29 U.S.C. §153(d).

Section 7 of the National Labor Relations Act, as amended by the Labor-Management Relations Act of 1947, 29 U.S.C. §157.

Sections 8(a)(3) and (5) of the National Labor Relations Act as amended by the Labor-Management Relations Act of 1947, 29 U.S.C. §§158(a)3, 5.

Section 301 of the National Labor Relations Act, as amended by the Labor-Management Relations Act of 1947, 29 U.S.C. §185.

IV

STATEMENT OF THE CASE

A. Statement of Facts

As incorporated into the Findings of Fact and Conclusions of Law entered by the District Court on March 20, 1984, (Appendix, pp. D-3 - D-10) the following are the facts:

In early 1980, petitioner, Royal Center, Inc. ("RCI"), a Nevada corporation, acquired a hotel and casino complex

² The pertinent text of the statutes involved herein is set forth in Appendix at pp. G-1 - G-2 .

in Las Vegas, Nevada comprised of the Royal Inn Hotel and two adjacent motels, a gaming casino and restaurant and bar facilities therein. Renovations were made and the complex was renovated, renamed the Royal Americana Hotel & Casino and operated by RCI under its unrestricted gaming license.

The Royal Americana complex consisted of a 5,000 square foot casino and 308 hotel guest rooms located in "Tower" and motel structures, and was operated as a full-service luxury Las Vegas "strip" hotel with a full casino and approximately 250 slot machines. The Royal Americana provided beverage service through two bars, and offered restaurant fare and live entertainment. The Royal Americana did not provide fast food service, arcade games of skill and chance nor family-oriented facilities of any type.

RCI was a party to a collective bargaining agreement ("Agreement") with the Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartender's Union Local 165 (jointly "Union"). Until its closure on March 2, 1982, RCI employed approximately 180 employees in the classifications covered by the Agreement. From the date of opening through March 7, 1982, the Royal Americana employed in all a total of approximately 300 employees. The 180 employees in the bargaining unit included cooks, kitchen employees, dining room and showroom employees, cashiers and changegirls, bell desk employees, bar employees and housekeeping employees. Managerial control over all employees and all facets of operations, including labor relations, was vested exclusively in RCI's executive and supervisory staff.

Faced with heavy operating losses and poor economic conditions, RCI closed effective March 1, 1982, and all employees covered under the Agreement were terminated as of March 7, 1982. RCI concurrently terminated all

other employees save several administrative employees who acted as caretakers and conducted the minimum gaming required to maintain RCI's unrestricted gaming license should RCI elect to operate another gaming establishment. This minimal gaming was the sole activity of RCI between March 2, 1982 and November 20, 1983. RCI operated sixteen slot machines forty hours a week and one blackjack table eight hours a week. The gaming occupied a minute portion of the physical premises which were vacant and eventually demolished. In June, 1982 RCI entered into a release agreement with the Hotel Employees & Restaurant Employees International Union Welfare Fund.

On November 20, 1983, a Nevada limited partnership, 305 Convention Center Drive Associates ("305"), commenced operations at the former Royal Americana site. 305 had acquired assets and the premises of the Royal Americana in late 1982 to create a family entertainment center on substantially renovated premises. 305 is comprised of an individual general partner, Donald Schupak, who owns a 1% interest individually as general partner, a corporate general partner, Namrob Corp., and fifteen limited partners including fourteen investor limited partners and RCI, which holds a 9.9% limited partnership interest. RCI's limited partnership interest is subject to a one-way option of the remaining investors to purchase RCI's interest pro rata in 1990 or earlier upon certain conditions. No limited partner has management or control of the enterprise, which authority is reserved to the general partner. Under its gaming license RCI operates an adult gaming concession by separate agreement with 305.

As the seller, RCI received approximately \$77,000.00 cash, assumption by 305 of \$988,422.89 in equipment leases and the benefits of a mortgage of \$14,288,170.00 payable over twenty years. RCI's twenty year concession

agreement obligates it to pay \$58,333.00 per month to 305 through 1984, payments increasing 5.6% per annum thereafter.

Between September 1982 and November 1983, all structures other than the "Tower" and casino were demolished. A 20,000 square foot extension was constructed on previously undeveloped property. Additional parking facilities were constructed where the motel structures once stood. The new facility houses an extensive family arcade and game center featuring carnival midway games, video games and supervised children's playrooms, fast food facilities offering hot dogs, pizza, sandwiches, soft drinks, beer and wine and a Riverboat Playhouse Theatre featuring periodic animated entertainment. Contiguous thereto is an "adult arcade" with approximately 250 slot machines and mechanical gaming devices. As of the date of hearing before the District Court, table games, *i.e.* one blackjack table, had been operated for a single eight hour period. The adult gaming concession is RCI's only function. In June 1984, 305 reopened the refurbished hotel facilities.

RCI employs approximately fifty employees in connection with its gaming concession, of which approximately twelve are changegirls. Other than the twelve changegirls, RCI employs no one in the classifications set forth in the Agreement. In the case of overall operations, labor relations policy is set by the general partner of 305. With regard to the adult arcade, labor relations policy is set by the concessionaire, RCI.

B. History of the Case

On November 23, 1983, the Union filed unfair labor practice charges against RCI and 305 with the National Labor Relations Board ("NLRB") charging each entity with violation of Sections 8(a)(1), (3) and (5) of the

National Labor Relations Act (29 U.S.C. §§158(a)(1), (3) and (5)) ("NLRA"). In its charges, designated as Case Nos. 31-CA-13688 and 31-CA-13687 by the NLRB, the Union asserted that RCI had refused to bargain with the Union and that 305 was the "alter ego" of RCI. On January 27, 1984, after complete investigation, the Regional Director of Region 31 of the NLRB dismissed the Union's Charges and refused to issue a Complaint, expressly finding that 305 was not an alter ego of RCI, and that the radical change in, and drastic reduction of, RCI's business operations excused it from any continuing bargaining obligation with the Union. (See Appendix, pp. E-1 - E-4.) On March 27, 1984, the Union's appeal of this decision to the General Counsel of the NLRB was denied. (See Appendix p. F-1.)

In the interim, on December 2, 1983, this action was brought by the Union against RCI in Nevada state court seeking arbitration of the allegations (1) that RCI had breached certain "restraint on transfer" provisions of the Agreement and (2) that RCI and 305 were "alter egos". The Union sought an order compelling RCI to submit each issue to arbitration under the agreement between RCI and the Union. The statutory basis for the suit, and hence federal jurisdiction upon removal, was Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. §185.

On December 7, 1983, RCI removed the action to the United States District Court for the District of Nevada. On December 22, 1983 RCI answered the Complaint and denied the continued existence of the Agreement, affirmatively asserting that the extended closure followed by the sale of assets to a third party, 305, had extinguished the Agreement and any bargaining obligations as a matter of law, and that submission of either grievance to arbitration was improper.

The matter was heard by the District Court on March 5, 1984. The District Court granted the Union's Motion to Compel Arbitration of two issues: (1) whether the asset purchaser (305) was an "alter ego" of RCI, and (2) whether RCI violated Section 29.02 of the Agreement requiring assumption of the Agreement by a purchaser of the business. (See Appendix pp. D-3 - D-9.)

RCI appealed and on February 27, 1985, the Ninth Circuit issued its initial Opinion, affirming arbitration of the "restraint on transfer" grievance but rejecting arbitration of the alleged "alter ego" relationship between RCI and 305 since the National Labor Relations Board had refused to proceed against RCI, finding, upon investigation, that no "alter ego" relationship existed. The Court concluded that it need not decide whether the Agreement survived RCI's bona fide closure, citing *Nolde Bros., Inc. v. Local No. 58, Bakery and Confectionery Workers' Union*, 430 U.S. 243, 97 S.Ct. 1067 (1977) for the proposition that the parties may be required to submit to post-contract arbitration in any event.

On March 13, 1985, the Union sought rehearing, contending that arbitration of the "alter ego" grievance was required under *Edna H. Pagel, Inc. v. Teamsters Local Union 595*, 667 F.2d 1275 (9th Cir. 1982). After further briefing, on May 22, 1985 the Court granted rehearing, concurrently vacating its prior Opinion and entering judgment affirming arbitration of the "alter ego" grievance as well, noting, however, that the arbitrator should give deference, in the absence of additional evidence, to the NLRB's earlier finding that 305 was not an "alter ego" of RCI. (754 F.2d at p. 839-840)

RCI petitioned this Court for a Writ of Certiorari to review the decision of the Ninth Circuit. On April 21, 1986, this Court granted RCI's Petition and vacated the judgment, remanding the matter for further consideration

in light of *A.T.&T. Technologies, Inc., v. Communications Workers*, __ U.S __, 106 S.Ct. 1415 (1986). (See Appendix, p. B-1). The Ninth Circuit ordered supplemental briefs in the matter, and on August 12, 1986, rendered its Opinion on Remand. The Ninth Circuit in essence refiled its previously vacated Opinion, and commanded arbitration of all submitted issues without any substantive discussion of the impact of the *A.T.&T.* decision as ordered by this Court, deleting only those comments regarding the consideration to be given by the arbitrator to the prior finding of the National Labor Relations Board on the "alter ego" issue.

Because the ruling of the Ninth Circuit raises significant and important questions regarding (i) the propriety of a judicial refusal to decide issues of substantive arbitrability reserved to the Courts as this Court reiterated in its *A.T.&T.* decision, both as to parties to be bound as "alter egos" and as to the basic question of contract survival, (ii) the ability of a union to sidestep the holding of this Court in *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 94 S.Ct. 2236 (1974) through the artifice of alleging that a purchaser of a business is an "alter ego," as opposed to a successor employer, and (iii) the proper weight to be accorded a determination of the NLRB founded upon its expertise in representational matters within its primary jurisdiction, petitioner Royal Center, Inc. respectfully suggests that issuance of a Writ of Certiorari to again review the judgment of the United States Court of Appeals for the Ninth Circuit is appropriate in the within cause.

V.

ARGUMENT

**A. Reference to Arbitration of the Union's
"Alter Ego" Claim Ignores the Mandate
of *A.T.&T. Technologies, Inc. v. Communi-
cations Workers* and Subverts the Holding
of *Howard Johnson Company, Inc. v.
Detroit Local Joint Executive Board*.**

In *A.T.&T. Technologies, Inc. v. Communication Workers*, __ U.S. __, 106 S.Ct. 1415 (1986), this Court held that judicial referral of the basic issue of substantive arbitrability to an arbitral forum constituted error. (106 U.S. at pp. 1418-1420.)

This Court detailed four basic principles guiding judicial enforcement of arbitration agreements (106 S.Ct. at pp. 1418-1419), the first two of which have been violated by the Ninth Circuit herein. The first principle involves parties (*who* may be held accountable under an arbitration agreement), while the second principle involves arbitral scope (*what* may be arbitrated). The Supreme Court reaffirmed the holding of *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 84 S.Ct. 909 (1964) that in the context of a business transaction the question of survival of contract terms creating a duty to arbitrate, and who may be bound thereto, is a matter for judicial resolution, restating its prior comments that "... a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty." (106 S.Ct. at p. 1419.) Moreover, the Supreme Court made it clear that even in the absence of a survival question, "[i]t is the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate

grievances predicated on a [particular issue]." (106 S.Ct. at p. 1420.)

In its prior Order, this Court recognized the import of the criteria discussed in *A.T.&T.*, and directed reconsideration by the Ninth Circuit in light thereof. Unfortunately, the Ninth Circuit altogether failed to analyze the scope or effect of the judicial duty to decide both *who* may be held accountable under an arbitration agreement and *what* grievance may be subject to arbitration, again affirming the District Court's blind reference of the "alter ego" issue to arbitration. The District Court did not analyze the "alter ego" claims on a factual basis but rather referred *to the arbitrator* the fundamental question of whether 305 and RCI are one and the same in the first instance, stating as follows:

"I don't know the answer as a matter of law, to the situation where, within the period the contract runs, within the four years, the employer stops operation and then resumes operation, a situation that causes the Union to allege in its demand that the grievances be arbitrated, that the new operation is the alter ego of the old. There are underlying questions of fact there to be decided. It seems to me, they are clearly questions for the arbitrator."
(R.T., page 49, lines 18-25)

To the contrary, these "questions of fact" are precisely those which this Court has held must be decided by the judiciary.

The Ninth Circuit has, each time the issue has been presented, likewise declined to decide the "alter ego" issue, and upheld reference to arbitration based solely on the general presumption favoring the broad scope of arbitration clauses. (796 F.2d at p. 1163). However, the arbitration clause at issue is not broad, but is in fact limited to

four specific areas of dispute, the "meaning, interpretation, application to employees covered by this agreement, or alleged violation of any provision of this agreement." (796 F.2d at p. 1160) The posed "alter ego" issue does not concern any such issue, indeed after the closure and extended hiatus in operations, there were and yet are no employees or employee rights subject to the Agreement, nor does the grievance bring into play any question of contract interpretation. The issue is of parties, not arbitral coverage, and both courts below have misapplied a policy favoring arbitral coverage to an issue solely of judicial construction under *A.T.&T.*, whether a particular party may be held bound to an agreement in the first instance. See also: *A.T.&T. Information Systems v. Local 13000 Communication Workers of America*, 797 F.2d 147 (3rd Cir. 1986); *Service Employees Local 47 v. Commercial Property Services, Inc.*, 755 F.2d 499, 504-505 (6th Cir. 1985); *American Bell, Inc. v. Federation of Telephone Workers*, 736 F.2d 879 (3rd Cir. 1984); *Carpenters Local Union No. 1846 v. Pratt-Farnsworth*, 690 F.2d 489, 509-517 and notes 10, 11 (5th Cir. 1982), *cert. denied*, 104 S.Ct. 335 (1983).

The Union's basic proposition is that a purchaser and seller, as "alter egos," may be held to arbitrate their relationship. The seller (for and on behalf of *both parties*) may be compelled to arbitrate and both parties may then be bound to the terms of a labor agreement committed to only by the seller. This argument assumes its conclusion. What is required is a judicial determination that an "alter ego" relationship exists before the substantive question of contract breach may be committed to an arbitral forum. Arbitrators may not properly determine who the parties to an agreement are, a position of eminent logic since arbitral decisions are subject to circumscribed judicial review. A contrary conclusion undermines the entire structure of

federal labor policy concerning the respective rights and duties of the seller and purchaser of assets of a moribund business by allowing an arbitrator to decide who is bound to comply with a labor agreement.

This case presents the obverse side of the issue ruled upon in *Howard Johnson, supra*, where this Court held that a union representing employees of a selling entity could not compel the purchasing entity to arbitrate where no substantial continuity existed between the work forces of the seller and purchaser. In so holding, this Court limited its prior ruling in *John Wiley and Sons v. Livingston*, 376 U.S. 543, 84 S.Ct. 909 (1964) to its facts, there arbitration with a purchasing entity was compelled where the facts as found by the Court, the merger of two entities, indicated a sufficient continuity between them that "... suggests that holding Wiley bound to arbitrate under its predecessor's collective bargaining agreement may have been fairly within the reasonable expectations of the parties" (94 S.Ct. at p. 2241). Most recently, in *A.T.&T. Information Systems v. Local 13000, CWA, supra*, the Third Circuit applied the principles reiterated by this Court in *A.T.&T., supra*, and rejected an arbitrators finding that a subsidiary entity which purchased assets of a seller ostensibly subject to a "restraint on transfer" clause was bound to the labor agreement. Therein, the Third Circuit expressly rejected the reliance of the District Court upon "alter ego" and agency principles which might be applied in arbitration to bind the asset purchaser. (797 F.2d at pp. 150-151). The result herein should be no different. The Ninth Circuit has sanctioned arbitral determination of *who* may be held responsible under a labor agreement in clear violation of its duty under *A.T.&T., supra*.

Significantly, in *A.T.&T. Information Systems v. Local 13000, CWA, supra*, as herein, there existed no continuity between the work forces of the seller and purchaser. It is

this fact which distinguishes the result in *Wiley, supra*, where arbitration was sought on behalf of current employees whose benefits were altered in the course of a merger. More to the present point is *Howard Johnson, supra*, where the Union sought to hold the purchaser liable to hire the former employees of the seller (94 S.Ct. at pp. 2241-2242). This latter proposition, here initially sought by the Union, was found repugnant in view of the apt comment of this Court in *NLRB v. Burns International Security Services*, 406 U.S. 272, 92 S.Ct. 1571 (1972) that:

“[a] potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, . . . and nature of supervision.” (406 U.S. at pp. 287-288, as cited in *Howard Johnson, supra*, 94 S.Ct. at p. 2243)

It is precisely this incentive to the purchaser which the Union here seeks to control through its “alter ego” tactical maneuver. A union’s employment of the simple technique of alleging an “alter ego” relationship subject to arbitration rather than the less effective “successor employer” relationship renders the freedom of a purchaser to commence its business anew subject to the very arbitral forum which this Court found inappropriate in *Howard Johnson, supra*, and in *NLRB v. Burns Int’l Security Services*, 406 U.S. 272, 92 S.Ct. 1571 (1972). That this should be so under an arbitration clause which is limited to four specific areas of dispute, none of which fairly raise the “alter ego” question as an issue of contract terms, and in spite of the findings of the NLRB that (1) the seller is no longer bound to the Agreement and (2) no “alter ego” relationship exists (*see*: Appendix, pp. E-1 - E-4), only heightens the danger of the precedent established by the Ninth Circuit.

The foregoing dilemma is not avoided by the Union's contention that it seeks only to bind RCI to the terms of the Agreement by its "alter ego" claim. If such were the case, the "alter ego" theory is entirely superfluous to the Union's substantive theory that RCI has breached the Agreement by not requiring 305 to assume same in the sale of assets. 305's operation would, in that case, stand in any event as a measure of damages resulting from the purported contract breach. In actuality, were the Union to prevail in arbitration on the "alter ego" claim, RCI and 305 would be treated as a single entity in a proceeding to enforce the award, the result being that 305 would become a party to the Agreement. (See: *Howard Johnson, supra*, at p. 2242 n.5 and cases therein cited) In this respect, RCI finds apt the comments of Justice MacKinnon, dissenting in *Brotherhood of Locomotive Engineers v. I.C.C.*, 761 F.2d 714, 729 (D.C. Cir. 1985), *cert. pending* 106 S.Ct. 1457 (1986), now pending before this Court, that: "there is no basis in law or fact for such an absurd conclusion. It is basic contract law that one cannot be bound by agreements between third parties." Certainly if 305 is to be held bound to the labor agreement, it must be by judicial decree.

Accordingly, despite the mandate from this Court to apply the basic rule, reiterated in *A.T.&T.*, that substantive arbitrability is itself a matter solely for judicial determination, the Ninth Circuit has run roughshod over the judicial duty to decide the "alter ego" issue and has again blindly referred to an arbitral forum the basic determination of whether a non party (305) may be bound to the terms of a labor agreement. This was, and remains, clear error under the decisions of this Court, and places in serious jeopardy the federal labor policy enunciated by this Court.

B. The Court Below Improperly Referred to Arbitration the Issue of Contract Survival

In its appellate opinion in *A.T.&T.*, *supra*, the Seventh Circuit held that this Court's discussion of the judicial duty to decide arbitrability in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964) was *dicta*, and in any event tempered by this Court's observations in *Nolde Bros., Inc. v. Bakery Workers*, 430 U.S. 243, 255 n. 8, 97 S.Ct. 1067, 1074 n. 8 (1977) (*See*: 751 F.2d at p. 206). In its prior decision here, the Ninth Circuit held it unnecessary to decide whether the Agreement survived RCI's closure, ruling that the survivability of an arbitration clause as allowed in *Nolde Bros., Inc.*, *supra*, sufficed to allow reference of the disputed grievances to arbitration without consideration of the continued existence of the Agreement, or the possibility that a non party, 305, would be held to the terms of the Agreement by arbitral determination alone. (*See*: 754 F.2d at p. 837.) This Court vacated both decisions, and by its opinion in *A.T.&T.*, *supra*, dispelled any doubt cast upon the judicial duty by the *Nolde Bros., Inc.* footnote 8. It is at all times a judicial function to determine both *who* has agreed to arbitrate and *what* they have agreed to arbitrate. The possibility that an arbitration clause may survive contract termination as a mechanism for resolving disputes does not of itself breathe independent life to a labor agreement.

The mandate is that the judiciary must decide (1) whether 305, a *nonparty*, may be held accountable under the labor agreement as an "alter ego" of a signatory, and (2) whether the labor agreement survived bona fide closure so as to govern RCI's conduct many months later. Ordered to reconsider its prior Opinion in light of *A.T.&T.*, the Ninth Circuit blithely ignored this Court's Order, and again affirmed the District Court's complete failure to discharge

its duty to decide either *who* is bound to arbitrate (the alter ego issue) or *what* it is to be arbitrated (the contract survival issue), instead deferring to arbitration the entire preliminary inquiry as to the effect of a bona fide business closure on survival of a collective bargaining agreement and the question of whether a non party might be bound to that agreement by virtue of an alleged relationship with a selling party. (See: R.T. p. 49, lines 18-25).

The District Court did *not* find that the collective bargaining agreement had not been extinguished, but rather left that threshold question of arbitrability for the arbitrator. (R.T. p. 49) The Ninth Circuit has consistently declined to address the issue as well. (See: 796 F.2d at p. 1161, 754 F. 2d at p. 837). RCI has not agreed, either contractually or consensually, to an arbitrator's assessment of the impact of shutdown on the viability of the Agreement, and hence the arbitrability of the Union's claims. Non party 305 certainly has not. Prior to submission of these issues to an arbitral forum with limited judicial review, these entities are entitled as a matter of law to a judicial determination of whether or not they are bound to the terms of the Agreement, and thus must arbitrate accountability thereunder, or are otherwise bound to arbitrate a particular issue.

Thus, each court has improperly deferred the question of contract existence and its effect on the question of arbitrability to the arbitrator, the District Court noting only that the term of the collective bargaining agreement had not expired at the time complained of by the Union. (C.R. 19, Finding Nos. 2, 12). However, the focal questions raised by RCI, (1) whether 305 could properly be held its "alter ego" and (2) whether upon bona fide closure, the permanent, non-pretextual termination of all unit employees, and an extended hiatus the Agreement terminated by operation of law, have at no time been addressed by either the District Court or the Ninth Circuit (in any of its three

opinions in the matter) nor has it been found as a matter of law that the contract, or any specific term thereof, survived so as to govern the conduct of either RCI or 305 months and years later. Absent the requisite judicial finding, the District Court erred in compelling RCI to submit both issues to arbitration, and the Ninth Circuit persists in compounding that error, despite this Court's prior order of April 21, 1986.

RCI contends that the record establishes that arbitration of the Union's claims is improper, and judgment in its favor mandated. The facts of the case are not in dispute and establish that the closure of the Royal Americana on March 1, 1982 and the subsequent transfer of certain assets of the defunct operation to 305 in December 1982 were the non-pretextual result of a bona fide operational failure.

The Union's grievances do not involve any rights accrued or vested under the labor agreement, but simply the claim that for the duration of the labor agreement, and even in the absence of a represented employee complement, RCI was restrained from transferring assets of the defunct business absent the asset purchaser's assuming the Agreement, a situation which, if upheld, would render the assets untransferable. The initial point is that while a contract may retain sufficient vitality to continue a duty to arbitrate in the context of an ongoing employer/ employee relationship, or for the purpose of resolving disputes arising with respect to such relationship, the compelling rationale for preserving a duty to arbitrate dissipates in the absence of such issues. See, e.g., *Rochdale Village, Inc. v. Public Service Employees Union, Local No. 80*, 605 F.2d 1290, 1294-1297 and Note 6 (2nd Cir. 1979) ("[g]enerally such questions of contract termination are for the Court rather than for the arbitrator.") The stated duration of a collective bargaining agreement, of itself, does not create or maintain the requisite representative relationship upon which the

viability of a labor agreement depends. Rather, a bona fide and permanent discontinuance of operations terminates the overlying labor agreement in the absence of a represented employee complement. *Fraser v. Magic Chef Food Giant Markets, Inc.*, 324 F.2d 853, 856 (6th Cir. 1963). RCI was entitled to judicial determination of the survival issue in the first instance. *A.T.&T.*, *supra* at p. 1419.

Since the Agreement neither restricted RCI's right to shut down, nor expressly preserved any rights beyond termination of the employer/employee relationship, the only rights which the Union might properly pursue through contractual grievance procedures after cessation of operations are those which accrue or vest during the contract term. *See generally: Nolde Bros., Inc.*, *supra*; *Graphic Communications Union v. Chicago Tribune*, 794 F.2d 1222, 1226-8 (7th Cir. 1986)(*Nolde* held inapplicable where no accrued right or obligation under expired contract owing to employees was at issue) *United Rubber, Cork, Linoleum and Plastics Workers, etc. v. Great American Industries*, 479 F.Supp. 216, 234 (S.D.N.Y. 1979), *Flintkote Co. v. Textile Workers Union*, 243 F.Supp. 205 (D.N.J. 1965). No such issue is here presented.

Rather, the present dispute over (1) the alleged breach of the "restraint on transfer" clause in the context of a sale of assets occurring nine months after closure, first complained of nearly two years after closure, or (2) an alleged "alter ego" relationship between RCI and the purchaser at the time of reopening does not involve any vested or accrued rights of employees. All employees had been terminated and all recall rights long since expired. The dispute raises only the contention that the labor agreement liened RCI's business properties and prevented a sale of assets in the absence of a purchaser's assumption of the Agreement. This would, of course, enable the Union to claim representation over a new employee complement

without affording those employees the right to self-determination guaranteed by Section 7 of the LMRA (29 USC §157), and deprive the purchaser the negotiation of its own labor agreement. (See also: *Brotherhood of Locomotive Engineers v. I.C.C.*, *supra* at p. 729, Justice MacKinnon dissenting)

Collective bargaining agreements have no life independent of the employer/employee relationship upon which they are founded. Upon *bona fide* closure of a business, the collective bargaining agreement terminates as a matter of law, arbitration duties thereunder surviving only to resolve issues relating to the agreement affecting the employees whose representation provides the basis upon which the agreement is built. In the instant case, the dispute involves *no* rights accrued or vested, nor involves any employee rights whatsoever, issues which might otherwise require utilization of the dispute resolution procedure set forth in the Agreement. At best, the dispute is premised upon the issue of whether or not a procedural obligation to require assumption of a labor agreement survived a bona fide and extended business closure. As the case law discussed above demonstrates, the Agreement having terminated long prior to the challenged sale, there existed (1) no continuing duty to arbitrate after arising issues, (2) no obligation on RCI to require assumption in connection with the sale of assets, and (3) in any event, nothing to require assumption of, the agreement having terminated for lack of a covered enterprise. Accordingly, the judgment of the District Court should have been reversed, with judgment entered in favor of RCI, denying the Union's Motion to Compel Arbitration and dismissing its Complaint.

C. The Determination of the Court Below to Send the "Alter Ego" Grievance to Arbitration Despite the NLRB's Findings 1) That No Alter Ego Relationship Had Been Shown, and 2) That RCI Was No Longer Bound to the Labor Agreement Undermines the Primary Jurisdiction of the NLRB.

There can be little question that the allegation that RCI and 305 are "alter egos" constitutes a "labor dispute" as defined in Section 2(9) of the NLRA, 29 U.S.C. §152(9), within the authority of the General Counsel of the NLRB pursuant to Section 3(d) of the NLRA, 29 U.S.C. §153(d), to investigate and issue, or refuse to issue, an unfair labor practice complaint upon such charge. Indeed, the Union so proceeded, accusing RCI and 305, individually and collectively, of violating the NLRA, by allegedly discriminating against former employees of RCI and by making unilateral changes in the terms and conditions of employment.³ The Union charged that the asset sale was an "alter ego" sham transaction designed solely to eliminate RCI's collective bargaining obligation to it.

The Regional Director thoroughly investigated the charges, and refused to issue a complaint, finding that the Union's allegations, *even if proven*, did not constitute a violation of the NLRA, that insufficient evidence existed to establish that 305 was an "alter ego" of RCI, and that RCI was no longer bound to the collective bargaining agreement due to changed circumstances. (See: Appendix pp. E-3 - E-4) The Union appealed to the General Counsel, advancing additional evidentiary arguments, which were considered, investigated and rejected. (See: Appendix p. F-1).

³ Violations of Sections 8(a)3 and 8(a)5 of the NLRA, 29 USC §158(a)3 and 5.

While failing to persuade the NLRB that it had been aggrieved through the sale between RCI and 305, the Union sought and obtained an order compelling RCI to arbitrate the very same claim of "alter ego" between RCI and 305. On appeal, in its prior decision on rehearing, (754 F.2d 835), the Ninth Circuit affirmed this ruling, cryptically noting that the arbitrator should give "proper deference" to the NLRB ruling, but allowing that presentation of "additional evidence," presumably no more than a scintilla, would free the arbitrator to rule as he saw fit. In its current Opinion on Remand from this Court, the Ninth Circuit altogether omitted its analysis of the impact of the NLRB proceedings, freeing the arbitrator to rule without any regard to the written decision of the NLRB.

It is important to note that no contract provision is at issue under the Union's "alter ego" claim, which is premised solely upon the circumstances of the relationship between seller and purchaser. The issue is identical whether presented to the NLRB, a court or an arbitrator. This is not a situation where alternative theories which involve both a violation of the NLRA and an alleged breach of contract are presented. In the latter case, federal courts have referred the contract claim to arbitration or enforced arbitral awards based thereon despite the NLRB's refusal to process a charge on the statutory violation. See e.g.: *Miller Brewing Company v. Brewery Workers Local Union No. 9*, 739 F.2d 1159 (7th Cir. 1984); *Edna H. Pagel, Inc. v. Teamsters Local Union 595*, 667 F.2d 1275 (9th Cir. 1982); *Local Union No. 4, IBEW v. Radio Thirteen-Eighty, Inc.*, 334 F.Supp. 242 (E.D. Missouri 1971). However, as noted by the court below, the claim herein advanced was identical before both forums. (796 F.2d at p. 1161) Under these circumstances, there exists significant confusion regarding the effect of a prior NLRB determination.

In *Carpenters Local 1478 v. Stevens*, 743 F.2d 1271, 1278-1279 (9th Cir. 1984) the Ninth Circuit held that a Regional Director's unit determination that two entities were not a single employer took precedence over an arbitrator's award that they were "alter egos" of one another. In *Smith v. Local No. 25, Sheet Metal Workers Int. Assn.*, 500 F.2d 741, 748, N. 4 (5th Cir. 1974), the Fifth Circuit suggested that express findings of the Regional Director in support of a refusal to issue a complaint would operate to shift the burden of proof in a case involving allegations of a union's breach of its duty of fair representation. In *Thomas v. Consolidation Coal Co.*, 380 F.2d 69, 78-79 (4th Cir. 1967) the Fourth Circuit suggested that the NLRB's failure to issue a complaint on a charge of discriminatory discharge would "... serve to highlight the opportunities which have been available to plaintiffs to have their grievances authoritatively adjudicated."

RCI respectfully suggests that the confusion apparent in the foregoing cases should be resolved consistent with this Court's holding in *Howard Johnson*, 94 S.Ct. at p. 2243, by "... refusing to permit the rights and obligations of the parties to vary with the forum." *Carpenters Local Union No. 1846 v. Pratt-Farnsworth*, 690 F.2d 489, 513 (5th Cir. 1982); *Carpenters Local 1478 v. Stevens*, *supra*, at p. 1279. Where the issue presented to the NLRB varies not from that sought to be arbitrated, federal labor policy fashioned from the policies governing treatment of identical unfair labor practice cases should be uniformly applied. See: *Howard Johnson*, *supra*, 94 S.Ct. at 2239-2240; *Carpenters Local Union No. 1846 v. Pratt-Farnsworth*, *supra*, at p. 513. Stated in the converse, arbitration of the Union's "alter ego" claims in the face of the NLRB's express prior rejection of that contention would impermissibly intrude into the NLRB's exercise of its primary jurisdiction in enforcing the NLRA.

In this respect, the significance of the NLRB's determination that RCI was no longer bound to the collective bargaining agreement cannot be overlooked. This exercise of the NLRB's primary jurisdiction to rule on representation matters eliminates any "curative effect" of arbitration considered significant by this Court in *Carey v. Westinghouse Electric Corporation*, 375 U.S. 173, 84 S.Ct. 401, 409, 11 L.Ed.2d 320 (1964) since there remains no continuity in the workforces, indeed no ongoing relationship between the parties whatsoever. Compare: *Local No. 3-193, International Woodworkers v. Ketchikan Pulp Co.*, 611 F.2d 1295 (9th Cir. 1980) (judicial refusal to extend collective bargaining agreement to new locations due to encroachment upon NLRB jurisdiction to determine representation matters). Thus, through arbitration of the "alter ego" claim, the Union here attempts to hold RCI, and hence its alleged "alter ego" 305, to a collective bargaining agreement which the NLRB has found inoperative due to bona fide changed circumstances.

Were this Court not to reverse the conclusion of the court below commanding arbitration of the "alter ego" issue in the face of a contrary legal determination by the NLRB, nonsense results. The NLRB assumed all allegations of the Union to be true, and found no "alter ego" situation. Had the issue been less apparent, a complaint may have been issued and a trial been held. If RCI had there prevailed, the Union could pursue plenary judicial review. If RCI did not prevail, its remedy in an enforcement proceeding would also include plenary judicial review. In either event, arbitration would be foreclosed. However, the Union having wholly failed to muster sufficient evidence to proceed through the administrative process, now seeks to arbitrate the same issue before an arbitral forum subject to extremely limited judicial review. Hence, under the framework constructed by the court below, only the

weakest cases would be afforded an alternative forum for resolution and indeed would be *removed from plenary judicial review altogether*. The incentive then for a charged party is to do whatever is necessary to force the NLRB to issue an unfair labor practice complaint in order to avoid the possibility of duplicative proceedings and avail itself of the opportunity for judicial review on the merits.

This disincentive to dispose of meritless cases does disservice not only to the labor policy sought to be effectuated before the administrative agency with primary jurisdiction, and the litigative efficiency of that preferred forum, but as noted above, runs directly contrary to the principles espoused by this Court that it is improper to permit the rights and obligations of the parties to vary with the forum. The Union, having been accorded full credence in its claims by the Regional Director and failing to present even a *prima facie* case, must be foreclosed from pursuing the same claim before multiple forums in its search for a favorable result.

Accordingly, petitioner Royal Center, Inc. respectfully suggests that the Court below erred as a matter of law in compelling arbitration of the Union's "alter ego" claim in the face of a prior contrary legal determination by the NLRB on the same issue.

VI.

CONCLUSION

— For the foregoing reasons, and each of them, petitioner, Royal Center, Inc., respectfully prays that its Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit should be granted.

DATED: November 7, 1986

Respectfully submitted,

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APPENDIX A

-A 1-

**FOR PUBLICATION
FILED
AUG 12, 1986
Cathy A. Catterson, Clerk
U.S. Court of Appeals**

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CA NO. 84-1867
DC NO. CV-LV-83-826-RDF

**LOCAL JOINT EXECUTIVE BOARD OF
LAS VEGAS, CULINARY WORKERS
UNION, LOCAL 226 and BARTENDERS
UNION, LOCAL 165,**

Plaintiffs-Appellees,

vs.

ROYAL CENTER, INC.,
Defendant-Appellant.

OPINION

On Remand from the United States Supreme Court
Resubmitted August 1, 1986

Before: CHOY, FARRIS, and BEEZER, Circuit Judges.

FARRIS, Circuit Judge:

Royal Center, Inc. appeals the order of the District Court for Nevada, Foley, J. presiding, which had required RCI to submit to arbitration two grievances arising out of RCI's collective bargaining agreement with appellee Local Joint Executive Board of Las Vegas, Culinary Workers Union et al. RCI argues that the closure of its business terminated

its collective bargaining agreement, along with any obligation to arbitrate grievances that arose after the closure occurred.

In early 1980, RCI completed its acquisition of a complex in Las Vegas, Nevada, consisting of a casino, hotel and entertainment facilities. At that time, RCI entered into a collective bargaining agreement with the Union, which represented approximately 60% of the restaurant, casino, bar and housekeeping employees at the complex.

The agreement provided an exclusive arbitration remedy for "all grievances." A "grievance" was broadly defined as "a dispute or difference of opinion between the Union and the Employer involving the meaning, interpretation, application to employees covered by this Agreement, or alleged violation of any provision of their Agreement." Section 29.02 of the agreement also provided that in the event RCI sold its business, RCI would require its successor to assume the Collective Bargaining Agreement with the Union.

In March 1982, accumulated operating losses caused RCI to close its complex and terminate all employees covered by the collective bargaining agreement. Several months later, RCI sold the complex to a limited partnership, 305 Convention Center Drive Associates. The sale contract did not require the 305 corporation to assume RCI's collective bargaining agreement with the Union, despite Section 29.02 of that agreement. The 305 corporation performed substantial alterations and reopened the complex in November 1983 as a family arcade with game center, cartoon theater, and slot machine and mechanical gaming devices. RCI continues to operate the gaming devices, employing approximately fifty employees, not all of whom fall within the job classifications covered by the collective bargaining agreement with the Union.

Shortly after the reopening, the Union filed unfair labor practice charges with the National Labor Relations Board. The NLRB dismissed the Union's charge that 1) RCI and the 305 corporation had improperly refused to bargain with the Union, and 2) that no bona fide sale of business had occurred to the 305 corporation. The Union's appeal to the General Counsel of the NLRB was denied in March 1984.

The Union sued RCI in Nevada state court in December 1983, charging that RCI had 1) violated Section 29.02 by failing to condition the sale of the complex on the 305 corporation's assumption of the collective bargaining agreement, and 2) violated the collective bargaining agreement's hiring and other substantive terms after resuming operations with the 305 corporation in November 1983. Under this second allegation, the Union argued that no bona fide, arms-length sale of the complex had occurred, and hence the new enterprise was still covered by the collective bargaining agreement between RCI and the Union.

RCI removed the action to the District Court of Nevada. The district court granted the Union's Motion to Compel Arbitration of the Union's two grievances.

RCI appeals, claiming that the district court erred in deciding 1) that the collective bargaining agreement had not been terminated by RCI's closure of the complex, and 2) that the Union's grievances fell within the scope of the arbitration clause. We have jurisdiction over RCI's timely filed appeal under 28 U.S.C. § 1291.

I. DID THE ARBITRATION CLAUSE SURVIVE THE CLOSURE OF RCI'S OPERATIONS AND TERMINATION OF THE COLLECTIVE BARGAINING AGREEMENT?

The district court found that the collective bargaining agreement had not been extinguished when RCI closed its operations, and therefore that the agreement's arbitration clause continued to govern disputes arising after the closure. Because we find that the arbitration clause here survives closure regardless of whether the collective bargaining agreement generally remained in effect, we affirm the district court's decision to refer the dispute over section 29.02 to the arbitrator.

"Termination of a collective bargaining agreement does not necessarily extinguish a party's duty to arbitrate grievances arising under the contract." *O'Connor Co. v. Carpenters Local Union No. 1408*, 702 F.2d 824, 825 (9th Cir. 1983); see *Holly Sugar Corp. v. Distillery, Rectifying, Wine & Allied Workers*, 412 F.2d 899, 903-04 (9th Cir. 1969), cited with approval by *George Day Construction Co., Inc. v. United Brotherhood of Carpenters*, 722 F.2d 1471, 1479 (9th Cir. 1984). In fact, when the agreement has been extinguished by closure, we must presume that the parties intended the arbitration duty to survive. *Nolde Bros. Inc. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243, 255 (1977). This presumption favoring arbitrability "must be negated expressly or by clear implication," *Nolde* 430 U.S. at 255; see also *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 568 (1960); *Federated Metals Corp. v. United Steelworkers*, 648 F.2d 856, 859 (3d Cir.) cert. denied, 454 U.S. 1031 (1981), and draws its vitality from federal labor

policy and the relative inexpensiveness and expertise of the arbitrator. *Nolde*, 430 U.S. at 253-55; *Holly Sugar Corp.*, 412 F.2d at 904.

RCI presents no evidence to negate the presumption that its arbitration clause, which covers "all grievances," survives the termination of the agreement. The broad definition of arbitrable "grievances"—"a dispute or difference of opinion between the Union and the Employer involving the meaning, interpretation, application to employees covered by this Agreement, or alleged violation of any provision of this Agreement," is indistinguishable from arbitration provisions held to survive termination of the collective bargaining contract. See *Nolde*, 430 U.S. at 245, 252-55 (preserving duty to arbitrate "any grievances" following closure and expiration of contract); *John Wiley & Sons v. Livingston*, 376 U.S. 543, 553, 554 (1964) (preserving post-termination arbitration of "any differences, grievance or dispute between the Employer and the Union arising out of or relating to this agreement, or its interpretation or application, or enforcement"). The arbitration provision here survives regardless of whether the collective bargaining agreement was extinguished by RCI's closure.

II. DO THE GRIEVANCES FALL WITHIN THE SCOPE OF THE ARBITRATION CLAUSE?

We must next consider whether this particular controversy is covered by the duty to arbitrate. Like the survivability issue, the question of the scope of the arbitration duty is "a matter to be determined by the Court on the basis of the contract." *John Wiley*, 376 U.S. at 547, citing *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962); see *Frederick Meiswinkel, Inc. v. Laborers' Union*

Local 261, 744 F.2d 1374, 1376 (9th Cir. 1984); *Salinas Cooling Co. v. Fresh Fruit and Vegetable Workers*, 743 F.2d 705, 707 (9th Cir. 1984).

Following the Supreme Court, we have emphasized that the scope of the duty to arbitrate must be read quite broadly. As we recently held, "[w]e ordinarily will not except a controversy from coverage of a valid arbitration clause 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *Marchese v. Shearson Hayden Stone, Inc.*, 734 F.2d 414, 419 (9th Cir. 1984), citing *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960) When, as in this instance, the parties have agreed to submit "all grievances" to an arbitrator, "[t]he courts . . . have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. at 568 (footnote omitted); see *John Wiley*, 376 U.S. at 555.

Applying this lenient standard, the Supreme Court has referred for arbitration a dispute over severance pay rights, see *Nolde*, and a dispute over contractual seniority rights, see *Piano & Musical Instrument Workers, Local 2549 v. W.W. Kimball Co.*, 333 F.2d 761 (7th Cir.), *rev'd per curiam*, 379 U.S. 357 (1964), arising after a plant closing. The Court found dispositive the fact that "there is nothing in the arbitration clause that *expressly excludes* from its operation a dispute which arises under the contract, but which is based on events that occur after its termination." *Nolde*, 430 U.S. at 253 (emphasis added). Without such an express exclusion, and applying the general presumption in

favor of a broad scope for arbitration clauses, the Court sent the disputes to arbitration. *Id*; see also *John Wiley*, 376 U.S. at 554-55.

A. The grievance over Section 29.02 was properly sent to the arbitrator.

Nolde controls our decision. The arbitration clause does not "expressly exclude" a dispute over RCI's obligation to condition its sale of business on the 305 corporation's assumption of the collective bargaining agreement. Under *Nolde* and the general presumption in favor of a broad scope for arbitration clauses, the Section 29.02 grievance was properly sent to arbitration.

This result is also consistent with circuit court decisions referring claims for severance pay, pension benefits, vacation pay, and other typical collective bargaining rights due after a plant closing. See, e.g., *United Steelworkers v. American Smelting and Refining Co., Inc.*, 648 F.2d 863 (3d Cir.), cert denied, 454 U.S. 1031 (1981); *United Steelworkers v. Fort Pitt Steelcasting Division-Conval-Penn, Inc.*, 635 F.2d 1071 (3d Cir. 1980), cert. denied, 451 U.S. 985 (1981); *Monroe Sander Corp. v. Livingston*, 377 F.2d 6 (2d Cir.) cert. denied, 389 U.S. 831 (1967). All of these rights are directly implicated by Section 29.02, which works a complete transfer of severance pay, vacation, wage, seniority and other bargained-for terms to the new employer.

RCI, however, seeks to distinguish these cases as permitting arbitration only of "rights undeniably accruing under contract prior to termination." Because the benefits arising out of Section 29.02 of RCI's collective bargaining agreement will not accrue until *after* termination, RCI argues that arbitration is not necessarily compelled by prior cases.

RCI's focus on accrual, however, was implicitly rejected by the Supreme Court in *Nolde*, see *Federated Metals Corp.*, 648 F.2d at 861 (upholding benefits that had not even accrued until after contract expired); *Local No. 595, International Assoc. of Machinists v. Howe Sound Co.*, 350 F.2d 508 (3d Cir. 1965) (same). We have also questioned the accrual argument. *George Day Construction Co.*, 722 F.2d at 1478-79.

More importantly, RCI's distinction runs counter to the reasoning in *John Wiley*, 376 U.S. 543. The Court held that a package of wage, pension, severance and vacation pay rights, *id.* at 552, was arbitrable even after the original company merged with a new corporation and terminated the agreement. To reach its decision, the Court focused not on whether the rights "accrued" before or after the agreement was terminated, but instead on *preserving the original intent of the parties* as well as possible, when circumstances have arisen that were unanticipated when the agreement was drafted. *Id.* at 554. Because the package of rights would have been "plainly arbitrable" if the unanticipated merger had not occurred, the Court preserved their arbitrability after the merger as well.

The logic of *John Wiley* compels the arbitration of Section 29.02. The clause mandating carryover of the Union's labor contract is of no value to the bargaining Union until the contract for the sale of business is actually negotiated. This sale will frequently occur contemporaneous with or after closure of the original business—*i.e.*, after the original contract has been terminated. Although the parties here did not "expressly contemplate", *id.* at 554, a sale occurring after termination, the only way to preserve their intent that Section 29.02 be of any value to the Union would be to permit arbitration. In this way, rights that would have been "plainly arbitrable" had the sale occurred *prior* to termination will be preserved despite the

unanticipated occurrence of a sale *after* termination.

The only result consistent with the original intent of the parties, 376 U.S. at 554—and with the presumptively broad scope of arbitration—would be to send this dispute to the arbitrator. *Cf. American Smelting and Refining Co.*, 648 F.2d at 867 (upholding arbitrator's award of benefits to employees permanently laid off for six months after expiration of contract); *Fort Pitt*, 635 F.2d at 1078 (rejecting ten-month delay between contract termination and closure as a basis for excusing employer from duty to arbitrate).

RCI raises one final argument against interpreting Section 29.02 to fall within the scope of the arbitration clause. Where there has been a virtual 100% turnover of employees, application of a collective bargaining agreement negotiated on behalf of prior employees is "fundamentally unfair to the new employee complement and saddles the new operation with an agreement ill fitting its operational needs." This argument, however, is irrelevant to the issue of arbitrability before us; it instead goes to the advisability, on policy grounds, of enforcing a contractual provision freely bargained for by RCI in 1980. Any inquiry into the merits of the provision is explicitly barred by Supreme Court precedent. *AT&T Technologies, Inc. v. Communications Workers of America*, 106 S. Ct. 1416, 1418-1419 (1986); *United Steelworkers v. American Manufacturing Co.*, 363 U.S. at 568 ("[t]he courts . . . have no business weighing the merits of the grievance, [or] considering whether there is equity in a particular claim.") (footnote omitted).

B. The "alter ego" grievance.

Because there has not been an "express exclusion" of the issue whether RCI sold its business in a bona-fide, arms-length transaction to the 305 corporation, *see Nolde*, 430 U.S. at 253, the general presumption favoring a broad scope for arbitration clauses indicates that the "alter ego" grievance was properly referred to the arbitrator.

However, the NLRB Regional Director has already decided that "there is insufficient evidence that 305 Convention Drive Associates, L.P., is an alter ego of Royal Center Inc." This decision has been upheld on appeal to the NLRB General Counsel.

In *Carpenters' Union Local No. 1478 v. Stevens*, 743 F.2d 1271, 1277 (9th Cir. 1984), we held that the NLRB's express finding that one company was not the alter ego of the other company would preclude any extension of a collective bargaining agreement to the non-signatory, non-alter ego company. *Carpenters' Local* will preclude any attempt by the Union to enforce its collective bargaining agreement against the 305 corporation, since the NLRB has already determined that 305 is not the alter ego of RCI.

But *Carpenters' Local* does more than bar the Union from proceeding against the 305 corporation. Ordinarily it would preclude the Union from obtaining any arbitration award from RCI that may be based on a contrary finding that 305 is in fact the alter ego of RCI. *See* 743 F.2d at 1277 (barring contractual damages against the signatory corporation that were based on the fact that the non-signatory corporation was an alter ego).

On the other hand, the Union correctly notes that two Ninth Circuit cases bar us from, in effect, giving collateral estoppel power to the NLRB's finding that 305 is not the alter ego of RCI. As we held in *Edna H. Pagel, Inc. v.*

Teamsters Local Union 595, 667 F.2d 1275, 1280 (9th Cir. 1982), "an NLRB refusal to issue a complaint . . . cannot prohibit the unions from obtaining relief from the dispute resolution system for which they bargained—arbitration." See also *Paramount Transp. System v. Chauffeurs, Teamsters & Helpers, Local 150*, 436 F.2d 1064, 1066 (9th Cir. 1971). Because the instant case involves the "essentially factual" determination of whether an alter ego relationship exists, see *J.M. Tanaka Const., Inc. v. NLRB*, 675 F.2d 1029, 1033 (9th Cir. 1982); *NLRB v. Lantz*, 607 F.2d 290, 295 (9th Cir. 1979); see also *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942), we are governed by *Edna Pagel's* holding that "in cases involving issues of fact or contract interpretation the NLRB's refusal to issue a complaint does not act as res judicata or bar a party from seeking arbitration under the collective bargaining agreement." 667 F.2d at 1279-80.

Following *Edna Pagel*, we therefore AFFIRM the district court's decision to send the alter ego issue to the arbitrator.

III. CONCLUSION

"Whether or not the Union's demands have merit will be determined by the arbitrator in light of the fully developed facts. It is sufficient for present purposes that the demands are not so plainly unreasonable that the subject matter of the dispute must be regarded as non-arbitrable because it can be seen in advance that no award to the Union could receive judicial sanction." *John Wiley*, 376 U.S. at 555. Under this lenient standard, and in light of the presumption favoring both survival of an arbitration clause and a broad reading of that clause, the district court's order submitting the Section 29.02 grievance and the alter ego issue to arbitration is AFFIRMED.



APPENDIX B



SUPREME COURT OF THE UNITED STATES

NO. 85-299

ROYAL CENTER, INC.

Petitioner,

v.

**LOCAL JOINT EXECUTIVE BOARD OF
LAS VEGAS, CULINARY WORKERS UNION,
LOCAL 226, et al.**

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. ____ (1986).

IT IS FURTHER ORDERED that the petitioner, Royal Center, Inc., recover from Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, et al., Two Hundred Dollars (\$200.00) for its costs herein expended.

April 21, 1986

Clerk's costs: \$200.00



APPENDIX C

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**LOCAL JOINT EXECUTIVE BOARD OF
LAS VEGAS, CULINARY WORKERS UNION,
LOCAL 226 and BARTENDERS UNION,
LOCAL 165,**

Plaintiffs-Appellees

vs.

ROYAL CENTER, INC.,

Defendant-Appellant.

No. 84-1867

DC No. CV-LV-83-826-RDF
Nevada (Las Vegas)

ORDER

Before: CHOY, FARRIS, and BEEZER, Circuit Judges.

The petition for rehearing filed March 13, 1985, is granted.

The opinion filed February 27, 1985, is withdrawn and the attached opinion is ordered filed.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**LOCAL JOINT EXECUTIVE BOARD OF
LAS VEGAS, CULINARY WORKERS UNION,
LOCAL 226 and BARTENDERS UNION,
LOCAL 165,**

Plaintiffs-Appellees

vs.

ROYAL CENTER, INC.,

Defendant-Appellant.

No. 84-1867

DC No. CV-LV-83-826-RDF

OPINION

Appeal from the United States District Court
for the District of Nevada

Roger D. Foley, District Judge, Presiding

Argued and submitted January 17, 1985

San Francisco, California

Before: CHOY, FARRIS, and BREEZER, Circuit Judges.
FARRIS, Circuit Judge:

Royal Center, Inc. appeals the order of the District Court for Nevada, Foley, J. presiding, which had required RCI to submit to arbitration two grievances arising out of RCI's collective bargaining agreement with appellee Local Joint

Executive Board of Las Vegas, Culinary Workers Union et al. RCI argues that the closure of its business terminated its collective bargaining agreement, along with any obligation to arbitrate grievances that arose after the closure occurred.

In early 1980, RCI completed its acquisition of a complex in Las Vegas, Nevada, consisting of a casino, hotel and entertainment facilities. At that time, RCI entered into a collective bargaining agreement with the Union, which represented approximately 60% of the restaurant, casino, bar and housekeeping employees at the complex.

The agreement provided an exclusive arbitration remedy for "all grievances." A "grievance" was broadly defined as "a dispute or difference of opinion between the Union and the Employer involving the meaning, interpretation, application to employees covered by this Agreement, or alleged violation of any provision of this Agreement." Section 29.02 of the agreement also provided that in the event RCI sold its business, RCI would require its successor to assume the Collective Bargaining Agreement with the Union.

In March 1982, accumulated operating losses caused RCI to close its complex and terminate all employees covered by the collective bargaining agreement. Several months later, RCI sold the complex to a limited partnership, 305 Convention Center Drive Associates. The sale contract did *not* require the 305 corporation to assume RCI's collective bargaining agreement with the Union, despite Section 29.02 of that agreement. The 305 corporation performed substantial alternations and reopened the complex in November 1983 as a family arcade with game center, cartoon theater, and a slot machine and mechanical gaming devices. RCI continues to operate the gaming devices, employing approximately fifty employees, not all whom fall within the job classification covered by the collective bargaining agreement with the Union.

Shortly after the reopening, the Union filed unfair labor practice charges with the National Labor Relations Board. The NLRB dismissed the Union's charge that 1) RCI and the 305 corporation had improperly refused to bargain with the Union, and 2) that no bona fide sale of business had occurred to the 305 corporation. The Union's appeal to the General Counsel of the NLRB was denied in March 1984.

The Union sued RCI in Nevada state court in December 1983, charging the RCI had 1) violated Section 29.02 by failing to condition the sale of the complex on the 305 corporation's assumption of the collective bargaining agreement, and 2) violated the collective bargaining agreement's hiring and other substantive terms after resuming operations with the 305 corporation in November 1983. Under this second allegation, the Union argued that no bona fide, arms-length sale of the complex has occurred, and hence the new enterprise was still covered by the collective bargaining agreement between RCI and the Union.

RCI removed the action to the District Court of Nevada. The district court granted the Union's Motion to Compel Arbitration of the Union's two grievances.

RCI appeals, claiming that the district court erred in deciding 1) that the collective bargaining agreement had not been terminated by RCI's closure of the complex, and 2) that the Union's grievances fell within the scope of the arbitration clause. We have jurisdiction over RCI's timely filed appeal under 28 U.S.C. § 1291.

**I. DID THE ARBITRATION CLAUSE
SURVIVE THE CLOSURE OF RCI'S
OPERATIONS AND TERMINATION
OF THE COLLECTIVE BARGAINING
AGREEMENT?**

The district court found that the collective bargaining agreement had not been extinguished when RCI closed its operations, and therefore that the agreement's arbitration clause continued to govern disputes arising after the closure. Because we find that the arbitration clause here survives closure regardless of whether the collective bargaining agreement generally remained in effect, we affirm the district court's decision to refer the dispute over section 29.02 to the arbitrator.

"Termination of a collective bargaining agreement does not necessarily extinguish a party's duty to arbitrate grievances arising under the contract." *O'Conner Co. v. Carpenters Local Union No. 1408*, 702 F.2d 824, 825 (9th Cir. 1983); *see Holly Sugar Corp. v. Distillery, Rectifying, Wine & Allied Workers*, 412 F.2d 899, 903-04 (9th Cir. 1969); cited with approval by *George Day Construction Co., Inc. v. United Brotherhood of Carpenters*, 722 F.2d 1471, 1479 (9th Cir. 1984). In fact, when the agreement has been extinguished by closure, we must presume that the parties intended the arbitration duty to survive. *Nolde Bros. Inc. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243, 255 (1977). This presumption favoring arbitrability "must be negated expressly or by clear implication," *Nolde* 430 U.S. at 255; *see also United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 568 (1960); *Federated Metals Corp. v. United Steelworkers*, 648 F.2d 856, 859 (3d Cir.) *cert. denied*, 454 U.S. 1031 (1981), and draws its vitality from federal labor

policy and the relative inexpensiveness and expertise of the arbitrator. *Nolde*, 430 U.S. at 253-55; *Holly Sugar Corp.*, 412 F.2d at 904.

RCI presents no evidence to negate the presumption that its arbitration clause, which covers "all grievances," survives the termination of the agreement. The broad definition of arbitrable "grievances"—"a dispute or difference of opinion between the Union and the Employer involving the meaning, interpretation, application to employee covered by this Agreement, or alleged violation of any provision of this Agreement," is indistinguishable from arbitration provisions held to survive termination of the collective bargaining contract. See *Nolde*, 430 U.S. at 245, 252-55 (preserving duty to arbitrate "any grievances" following closure and expiration of contract); *John Wiley & Sons v. Livingston*, 376 U.S. 543, 553, 554 (1964) (preserving post-termination arbitration of "any differences, grievance or dispute between the Employer and the Union arising out of or relating to this agreement, or its interpretation or application, or enforcement"). The arbitration provision here survives regardless of whether the collective bargaining agreement was extinguished by RCI's closure.

II DO THE GRIEVANCES FALL WITHIN THE SCOPE OF THE ARBITRATION CLAUSE?

We must next consider whether this particular controversy is covered by the duty to arbitrate. Like the survivability issue, the question of the scope of the arbitration duty is "a matter to be determined by the Court on the basis of the contract." *John Wiley*, 376 U.S. at 547, citing *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962); see *Frederick Meiswinkel, Inc. v. Laborers' Union*

Local 261, 744 F.2d 1374, 1376 (9th Cir. 1984); *Salinas Cooling Co. v. Fresh Fruit and Vegetable Workers*, 743 F.2d 705, 707 (9th Cir. 1984).

Following the Supreme Court, we have emphasized that the scope of the duty to arbitrate must be read quite broadly. As we recently held, "[w]e ordinarily will not except a controversy from coverage of a valid arbitration clause 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *Marchese v. Shearson Hayden Stone, Inc.*, 734 F.2d 414, 419 (9th Cir. 1984), citing *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). When, as in this instance, the parties have agreed to submit "all grievances" to an arbitrator, "[t]he courts . . . have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. at 568 (footnote omitted); see *John Wiley*, 376 U.S. at 555.

Applying this lenient standard, the Supreme Court has referred for arbitration a dispute over severance pay rights, see *Nolde*, and a dispute over contractual seniority rights, see *Piano & Musical Instrument Workers, Local 2549 v. W.W. Kimball Co.*, 333 F.2d 761 (7th Cir.), *rev'd per curiam*, 379 U.S. 357 (1964), arising after a plant closing. The Court found dispositive the fact that "there is nothing in the arbitration clause that *expressly excludes* from its operation a dispute which arises under the contract, but which is based on events that occur after its termination." *Nolde*, 430 U.S. at 253 (emphasis added). Without such an express exclusion, and applying the general presumption in

favor of a broad scope for arbitration clauses, the Court sent the dispute to arbitration. *Id*; see also *John Wiley*, 376 U.S. at 54-55.

**A. The grievance over Section 29.02
was properly sent to the arbitrator.**

Nolde controls our decision. The arbitration clause does not "expressly exclude" a dispute over RCI's obligation to condition its sale of business on the 305 corporation's assumption of the collective bargaining agreement. Under *Nolde* and the general presumption in favor of a broad scope for arbitration clauses, the Section 29.02 grievance was properly sent to arbitration.

This result is also consistent with circuit court decisions referring claims for severance pay, pension benefits, vacation pay, and other typical collective bargaining rights due after a plant closing. See, e.g., *United Steelworkers v. American Smelting and Refining Co., Inc.*, 648 F.2d 863 (3d Cir.), *cert. denied*, 454 U.S. 1031 (1981); *United Steelworkers v. Fort Pitt Steelcasting Division-Conval-Penn. Inc.*, 635 F.2d 1071 (3d Cir. 1980), *cert denied*, 451 U.S. 985 (1981); *Monroe Sander Corp. v. Livingston*, 377 F.2d 6 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967). All of these rights are directly implicated by Section 29.02, which works a complete transfer of severance pay, vacation, wage, seniority and other bargained-for terms to the new employer.

RCI, however, seeks to distinguish these cases as permitting arbitration only of "rights undeniably accruing under contract prior to termination." Because the benefits arising out of Section 29.02 of RCI's collective bargaining agreement will not accrue until *after* termination, RCI argues that arbitration is not necessarily compelled by prior cases.

RCI's focus on accrual, however, was implicitly rejected by the Supreme Court in *Nolde*, see *Federated Metals Corp.*, 648 F.2d at 861 (upholding benefits that had not even accrued until after contract expired); *Local No. 595, International Assoc. of Machinists v. Howe Sound Co.* 350 F.2d 508 (3d Cir. 1965) (same). We have also questioned the accrual argument. *George Day Construction Co.*, 722 F.2d at 1478-79.

More importantly, RCI's distinction runs counter to the reasoning in *John Wiley*, 376 U.S. 543. The Court held that a package of wage, pension, severance vacation pay rights, *id.* at 552, was arbitrable even after the original company merged with a new corporation and terminated the agreement. To reach its decision, the Court focused not on whether the rights "accrued" before or after the agreement was terminated, but instead on *preserving the original intent of the parties* as well as possible, when circumstances have arisen that were unanticipated when the agreement was drafted. *Id.* at 554. Because the package of rights would have been "plainly arbitrable" if the unanticipated merger had not occurred, the Court preserved their arbitrability after the merger as well.

The logic of *John Wiley* compels the arbitration of Section 29.02. The clause mandating carryover of the Union's labor contract is of no value to the bargaining Union until the contract for the sale of business is actually negotiated. This sale will frequently occur contemporaneous with or after closure of the original business—*i.e.*, after the original contract has been terminated. Although the parties here did not "expressly contemplate", *id.* at 554, a sale occurring after termination, the only way to preserve their intent that Section 29.02 be of any value to the Union would be to permit arbitration. In this way, rights that would have been "plainly arbitrable" had the sale occurred *prior* to termination will be preserved despite the

unanticipated occurrence of a sale *after* termination.

The only result consistent with the original intent of the parties, 376 U.S. at 554—and with the presumptively broad scope of arbitration—would be to send this dispute to the arbitrator. *Cf. American Smelting and Refining Co.*, 648 F.2d at 867 (upholding arbitrator's award of benefits to employees permanently laid off for six months after expiration of contract); *Fort Pitt*, 635 F.2d at 1078 (rejecting ten-month delay between contract termination and closure as a basis for excusing employer from duty to arbitrate).

RCI raises one final argument against interpreting Section 29.02 to fall within the scope of the arbitration clause. Where there has been a virtual 100% turnover of employees, application of a collective bargaining agreement negotiated on behalf of prior employees is "fundamentally unfair to the new employee complement and saddles the new operation with an agreement ill fitting its operational needs." This argument, however, is irrelevant to the issue of arbitrability before us; it instead goes to the advisability, on policy grounds, of enforcing a contractual provision freely bargained for by RCI in 1980. Apart from the inequity of allowing RCI to escape a contract provision freely entered into, any inquiry into the merits of the provision is explicitly barred by Supreme Court precedent. *United Steelworkers v. American Manufacturing Co.*, 363 U.S. at 568 ("[t]he courts . . . have no business weighting the merits of the grievance, [or] considering whether there is equity in a particular claim.") (footnote omitted).

B. The "alter ego" grievance.

Because there has not been an "express exclusion" of the issue whether RCI sold its business in a bona-fide, arms-length transaction to the 305 corporation, *see Nolde*, 430

U.S. at 253, the general presumption favoring a broad scope for arbitration clauses indicates that the "alter ego" grievance was properly referred to the arbitrator.

However, the NLRB Regional Director has already decided that "there is insufficient evidence that 305 Convention Drive Associates, L.P., is an alter ego of Royal Center Inc." This decision has been upheld on appeal to the NLRB General Counsel.

In *Carpenters' Union Local No. 1478 v. Stevens*, 743 F.2d 1271, 1277 (9th Cir. 1984), we recently held that the NLRB's express finding that one company was not the alter ego of the other company would preclude any extension of a collective bargaining agreement to the non-signatory, non-alter ego company. As the Joint Board properly acknowledged in oral argument, *Carpenters' Local* will preclude any attempt by the Union to enforce its collective bargaining agreement against the 305 corporation, since the NLRB has already determined that 305 is not the alter ego of RCI.

But *Carpenters' Local* does more than bar the Union from proceeding against the 305 corporation. It also precludes the Union from obtaining any arbitration award from RCI that may be based on a contrary finding that 305 is in fact the alter ego of RCI. See 743 F.2d at 1277 (barring contractual damages against the signatory corporation that were based on the facts that the non-signatory corporation was an alter ego). Now that the NLRB has determined that 305 is not the alter ego of RCI, the arbitrator is prohibited from making an award that is inconsistent with the NLRB's determination. See *Carey v. Westinghouse Electric Corp.* 375 U.S. 261, 272 (1964) ("the Board's ruling would, of course, take precedence [over the arbitrator's]"); *Cannery Warehousemen, Food Processors, Drivers and Helpers v. Haig Berberian, Inc.*, 623 F.2d 77, 81 (9th Cir. 1980) (citing extensive line of

cases following *Carey* on this point).

On the other hand, the Union correctly notes that two Ninth Circuit cases bar us from, in effect, giving collateral estoppel power to the NLRB's finding that 305 is not the alter ego of RCI. As we held in *Edna H. Pagel, Inc. v. Teamsters Local Union 595*, 667 F.2d 1275, 1280 (9th Cir. 1982), "an NLRB refusal to issue a complaint . . . cannot prohibit the unions from obtaining relief from the dispute resolution system for which they bargained—arbitration." See also *Paramount Transp. System v. Chauffeurs, Teamsters & Helpers, Local 150*, 436 F.2d 1064, 1066 (9th Cir. 1971). Because the instant case involves the "essentially factual" determination of whether an alter ego relationship exists, see *J.M. Tanaka Const., Inc. v. NLRB*, 675 F.2d 1029, 1033 (9th Cir. 1982); *NLRB v. Lantz*, 607 F.2d 290, 295 (9th Cir. 1979); see also *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942), we are governed by *Edna Pagel's* holding that "in cases involving issues of fact or contract interpretation the NLRB's refusal to issue a complaint does not act as res judicata or bar a party from seeking arbitration under the collective bargaining agreement." 667 F.2d at 1279-80.

Following *Edna Pagel*, we therefore AFFIRM the district court's decision to send the alter ego issue to the arbitrator. However, the arbitrator should note that the "supremacy doctrine," *Haig Berberian*, 623 F.2d at 81, citing *Carey*, 375 U.S. at 272, requires that he give proper deference to the NLRB's earlier finding that the 305 corporation is not the alter ego of RCI. If the Union introduces additional evidence not before the NLRB, or alternative theories for an award other than the alter ego theory, the arbitrator may still make an award in the Union's favor without acting "inconsistently" with the NLRB's earlier finding.

III. CONCLUSION

"Whether or not the Union's demands have merit will be determined by the arbitrator in light of the fully developed facts. It is sufficient for present purposes that the demands are not so plainly unreasonable that the subject matter of the dispute must be regarded as non-arbitrable because it can be seen in advance that no award to the Union could receive judicial sanction." *John Wiley*, 376 U.S. at 555. Under this lenient standard, and in light of the presumption favoring both survival of an arbitration clause and a broad reading of that clause, the district court's order submitting the Section 29.02 grievance and the alter ego issue to arbitration is AFFIRMED.



APPENDIX D



UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LOCAL JOINT EXECUTIVE BOARD OF LAS
VEGAS, CULINARY WORKERS UNION, LOCAL
226 and BARTENDERS UNION, LOCAL 165,

Plaintiffs,

vs.

ROYAL CENTER, INC.,

Defendants,

CASE NO. CV-LV-83-826, RDF

JUDGMENT

The Court having read the pleadings and papers in this case, having heard the argument of Counsel, and having rendered its Findings of Fact and Conclusions of Law,

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's grievances as set forth in its Complaint shall be submitted by Defendant to arbitration pursuant to the provisions of Article 22 of the Collective Bargaining Agreement which is Exhibit "A" to the Complaint

DATED this 20th day of March, 1984.

ROGER D. FOLEY
UNITED STATES DISTRICT
JUDGE

Submitted By:

JEFF D. McCOLL, III, ESQ.
1701 W. Charleston #680
Las Vegas, Nevada 89102
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

**LOCAL JOINT EXECUTIVE BOARD OF LAS
VEGAS, CULINARY WORKERS UNION, LOCAL
226 and BARTENDERS UNION, LOCAL 165,**

Plaintiffs,

vs.

ROYAL CENTER, INC.,

Defendants,

CASE NO. CV-LV-83-826, RDF

**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND JUDGMENT**

This matter came of for Hearing before the Court March 5, 1984 at 10:30 o'clock A.M. Plaintiff was present by Counsel, JEFF D. McCOLL, III, ESQ. and RICHARD G. McCracken, ESQ. Defendant was present by Counsel, RICHARD L. MANN, ESQ., JOHN A. LAWRENCE, ESQ. and PETER BERNHARD, ESQ. The Court having read the pleadings and papers, and heard the argument of counsel, now makes the following Findings of Fact and Conclusions of Law and Judgment.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

1. Plaintiff is a labor organization as that term is defined in Section 2(5) of the Labor Management Relations Act, 1947, 29 U.S.C. Section 152(5).

2. Defendant is an employer within the meaning of Section 2(2) of the Labor Management Relations Act, 1947, 29 U.S.C. Section 152(2). Plaintiff and Defendant have entered into a written Collective Bargaining Agreement governing the wages, hours and other terms of conditions of employment of employees in certain classifications named in the Agreement. The Agreement is effective, by its terms, from April 2, 1980, through and including April 1, 1984, and thereafter as provided in the Agreement.

3. The Collective Bargaining Agreement provides a grievance and arbitration procedure in Article 22. Section 22.01 defines the subject matter which the Plaintiff and Defendant have agreed to submit to arbitration, and is very broad. Section 22.01 states:

"For purposes of this Agreement, a grievance is a dispute or difference of opinion between the Union and the Employer involving the meaning, interpretation, application to employees covered by this Agreement, or alleged violation of any provision of this Agreement."

In Section 22.03, a procedure of adjusting grievances is provided, and is specifically stated to be exclusive.

4. The preamble to the Collective Bargaining Agreement states that the Agreement is made and entered into by and between Plaintiff and the Defendant and the Defendant's successors and assigns.

5. Section 29.02 of the Collective Bargaining Agreement provides that in the event the employer sells or assigns his business, a condition to any such sale, assignment or transfer of ownership is that the employer will obtain from the successor or successors in interest a written assumption of the Collective Bargaining Agreement and furnish a copy thereof to the Union.

6. At the Hearing, counsel for Plaintiff agreed that the Statement of Facts contained in pages 3-9 of Defendant's Memorandum of Points and Authorities in Opposition to the Petition To Compel Arbitration is correct to the best of Plaintiff's knowledge. Said Statement of Facts is therefore incorporated herein by reference as though fully set forth. Additionally, counsel for Defendant explained at the Hearing that of the two (2) general partners of 305 Convention Center Drive, LP, Donald Schupak and Namrob Corporation, Namrob Corporation has been formed for the purpose of taking over Mr. Schupak's responsibility as a general partner in the event he becomes disabled for any reason from performing those duties.

7. Plaintiff has raised two (2) grievances with Defendant. The first (in point of time) is that Defendant violated Section 29.02 of the Collective Bargaining Agreement by selling its business without obtaining a written assumption of the Agreement from the buyer. The second is that no bona fide, arms-length sale of the business has actually taken place, and the business operated at 305 Convention Center Drive is still covered by The Collective Bargaining Agreement between Plaintiff and Defendant. In this regard, it is alleged that violations of the Collective Bargaining Agreement have occurred since the assumption of operations at that location in November, 1983. These violations include failing to hire through the hiring hall provided for in the Collective Bargaining Agreement, and not applying the terms and conditions of employment prescribed in the Agreement to employees in the classifications named in the Agreement.

8. Defendant has taken the position that it is not bound to the Collective Bargaining Agreement, and has not been since some time after March 7, 1982. Defendant contends that the Agreement was terminated by operation of law when the ROYAL AMERICANA operation was closed

and all of the employees who worked there were terminated, and there was a long hiatus before operations were resumed. Accordingly, Defendant argues, any contractual agreement to arbitrate was terminated along with the contract. Therefore, Defendant concludes, there was no Collective Bargaining Agreement in effect between it and Plaintiff when the alleged violations are said to have occurred, and furthermore, this Court cannot compel it to arbitrate those claims of violations because of the absence of any contractual agreement to arbitrate.

9. Defendant does not claim that it obtained from 305 Convention Center Drive Associates, LP, a written assumption of the Collective Bargaining Agreement, and it does not dispute the Plaintiff's claim that the terms of the Agreement are not being complied with at the "Paddle-wheel" operation.

10. The parties to a Collective Bargaining Agreement will be compelled to abide by their Agreement to arbitrate their disputes, if their Agreement to arbitrate even arguable covers the dispute in question. In *United Steelworkers of America vs. American Manufacturing Company*, 363 U.S. 564, 567-68, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960), the United States Supreme Court held:

The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is then confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.

The courts therefore have no business weighing the merits of the grievance, concerning whether there is equity in a particular claim, or determining whether there is a particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those the court will deem meritorious. The processing of even frivolous claims may have therapeutic values which those who are not a part of the plant environment may be quite unaware.

11. In *Communications Workers of America vs. Pacific Northwest Bell Telephone Company*, 337 F.2d 455 (CA9 1964), the Court stated:

"In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail ***." *United Steelworkers vs. Warrior & Gulf Nav. Co.* (363 U.S. 574) at 584-585.

But this recognizes that if evidence of intent is of the 'most forceful' character, it need not be confined to the language of the contract and it would appear clear that the decision whether such evidence dehors the agreement is of sufficient forcefulness is for the courts and not for the arbitrator. The Court, then, has not announced a rule of evidence; it has simply warned that the persuasive power of the evidence must be truth emerges with forceful clarity. We apprehend, however, that it is still for the courts to search out the truth upon this issue.

Further it would appear to us to be the law that if the evidence before Court of purpose to exclude a particular claim from arbitration is not sufficiently forceful, the result is not, as appellant suggest, that

the arbitrator must search for the truth at greater depth. The result, rather, is that the answer has been found and that the underlying dispute is arbitrable. If the true intent of the parties is to remain our concern, therefore, it would seem important that we be not required to close our eyes to all but the uncertain writing itself."

12. The grievances raised by the Plaintiff here are clearly within the broad coverage of Article 22 of the Collective Bargaining Agreement between Plaintiff and Defendant, which by its terms was in effect at all times material to this case, and is still in effect. Only the "most forceful" evidence that the parties intended to exclude a given subject from arbitration will suffice to overcome the presumption in favor of arbitrability, and Defendant here has not produced such evidence. Therefore, the Petition to Compel Arbitration will be granted.

DATED this 20th day of March, 1984.

ROGER D. FOLEY
UNITED STATES DISTRICT
JUDGE

Submitted By:

JEFF D. McCOLL, III, ESQ.
1701 W. Charleston #680
Las Vegas, Nevada 89102
Attorney for Plaintiffs

Approved as to form and content:

[not approved]

Disapproved as to form and content:

PETER C. BERNHARD, ESQ.
Schreck, Sloan, Bernhard & Jones
600 E. Charleston
Las Vegas, Nevada 89104
Attorney for Defendants.

RECEIPT OF COPY

RECEIPT OF COPY of the foregoing FINDINGS OF
FACT, CONCLUSIONS OF LAW AND JUDGMENT is
hereby acknowledged this 16th day of March, 1984.

SCHRECK, SLOAN, BERNHARD & JONES
BY: PETER C. BERNHARD ESQ,
600 E. Charleston
Las Vegas, Nevada 89104
Attorneys for Defendants



APPENDIX E

NATIONAL LABOR RELATIONS BOARD

REGION 31

(Letterhead)

Mr. Richard G. McCracken, Esquire
100 Van Ness Avenue, 9th Floor
San Francisco, CA 94102

Re: Royal Center, Inc. d/b/a
Royal Americana Hotel
Case 31-CA-13688

305 Convention Center Drive
Associates, LP
Case 31-CA-13687

Dear Mr. McCracken:

The above-captioned case(s) charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it does not appear that further proceedings on the charge(s) are warranted for the reason(s) set forth on the attached statement of reason for dismissal. I am, therefore, refusing to issue complaint herein.

Pursuant to the National Labor Relations Board Rules and Regulations, Series 8, as amended, you may obtain a review of this action according to the enclosed instructions.

-E 2-

Very truly yours,

Roger W. Goubeaux
Regional Director

3 Enclosures

Statement of reason for dismissal

Form NLRB-4938, Procedure for Filing An Appeal

Form NLRB-4767, Notice of Appeal

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

cc: General Counsel, Attn.: Office of Appeals, National
Labor Relations Board, Washington, D.C. 20570

Local Joint Executive Board of Las Vegas, Culinary
Workers Union, Local 226 and Bartenders Union, P.O.
Box 14396, Las Vegas, NV 89114

Mr. Richard L. Mann, Esquire, Rudin, Richman & Appel,
9601 Wilshire Blvd., Penthouse, Beverly Hills, CA 90210

Mr. John A. Lawrence, Rudin, Richman & Appel, 9601
Wilshire Blvd., Penthouse, Beverly Hills, CA 90210

**STATEMENT OF REASON FOR
DISMISSAL**

Re: Royal Center, Inc. d/b/a
Royal Americana Hotel
Case 31-CA-13688

305 Convention Center Drive
Associates, LP
Case-CA-13687

The factual allegations, if proven, do not constitute a violation of the Act.

In this regard, we note that there is insufficient evidence that 305 Convention Center Drive Associate, L.P. is an alter ego of Royal Center Inc. d/b/a Royal American Hotel because:

1. There is no evidence that the predecessor, though a limited partner, continues to exercise any managerial control over the successor and, in particular, over the labor relations policies of the successor. *John Fender Electric Co.*, 244 NLRB 957.

2. Part ownership is insufficient to establish that the predecessor controls the successor where, as here, the ownership devolved, in accordance with the original intent of the partnership, to a minority interest before the facility reopened and where, as here, the partnership agreement excludes the limited partners from any managerial authority.

3. The intimate involvement of Schupak with the predecessor does not give rise to the inference that the successor is other than an independent business entity. *Radiant Fashions, Inc.*, 202 NLRB 938. The Board will find alter

ego status where the successor formed by officials of the predecessor lacks real independence. *Circle T Corporation*, 238 NLRB 245. Such evidence is lacking here.

4. RCI operates the gaming and bar business in the successor's premises. Even ignoring RCI's representation that it will surrender the bar business to 305, there is insufficient evidence in the Region's view that this is less than an arm's length business arrangement. RCI leases it portion of the facility and pays a rental of \$58,000 a month. Moreover, 305 could not operate the gaming business had it wished to, since it lacks a license.

5. Riverboat Management (RM) existed prior to the creation of 305 and engaged in the same type of business that it has contracted to engage in at the 305 facility. Moreover, 305 has retained control over the labor relations policy of the employees that RM's subsidiary, Riverboat Management Company of Nevada, supervises.

We also note that 305 Associates, L.P. was free as the successor to R.C.I. to set the initial terms and conditions of employment. *Burns International Detective Agency, Inc. v. NLRB*, 406 U.S. 272. In our review, the altered nature of R.C.I.'s remaining business operation, the reduced employee complement and unrepresentative number of employee classifications excuses the Employer from a continued bargaining obligation. *Van's Packing Plant*, 211 NLRB 692 and *GT&E Data Services Corporation*, 194 NLRB 719.

Lastly, we note the failure to use the contractually established hiring hall, absent more, does not establish that the Employer unlawfully refused to hire R.C.I.'s former employee's.

APPENDIX F



NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL

(Letterhead)

Mr. Richard G. McCracken, Esq.
100 Van Ness Avenue, 9th Floor
San Francisco, CA 94102

Re: Royal Center, Inc. d/b/a
Royal Americana Hotel
Case 31-CA-13688

305 Convention Center Drive
Associates, LP
Case 31-CA-13687

Dear Mr. McCracken:

Your appeal from the Regional Director's refusal to issue complaint in the above-captioned case has been duly considered.

The appeal is denied substantially for the reasons set forth in the "Statement of Reason For Dismissal" attached to the Regional Director's letter of January 27, 1984. Contrary to your contention on appeal, the evidence indicates that Royal Center, Inc. did sell the hotel to 305 Convention Center Drive Associates.

Accordingly, further proceedings herein were deemed unwarranted.

-F 2-

Very truly yours,

William A. Lubbers
General Counsel

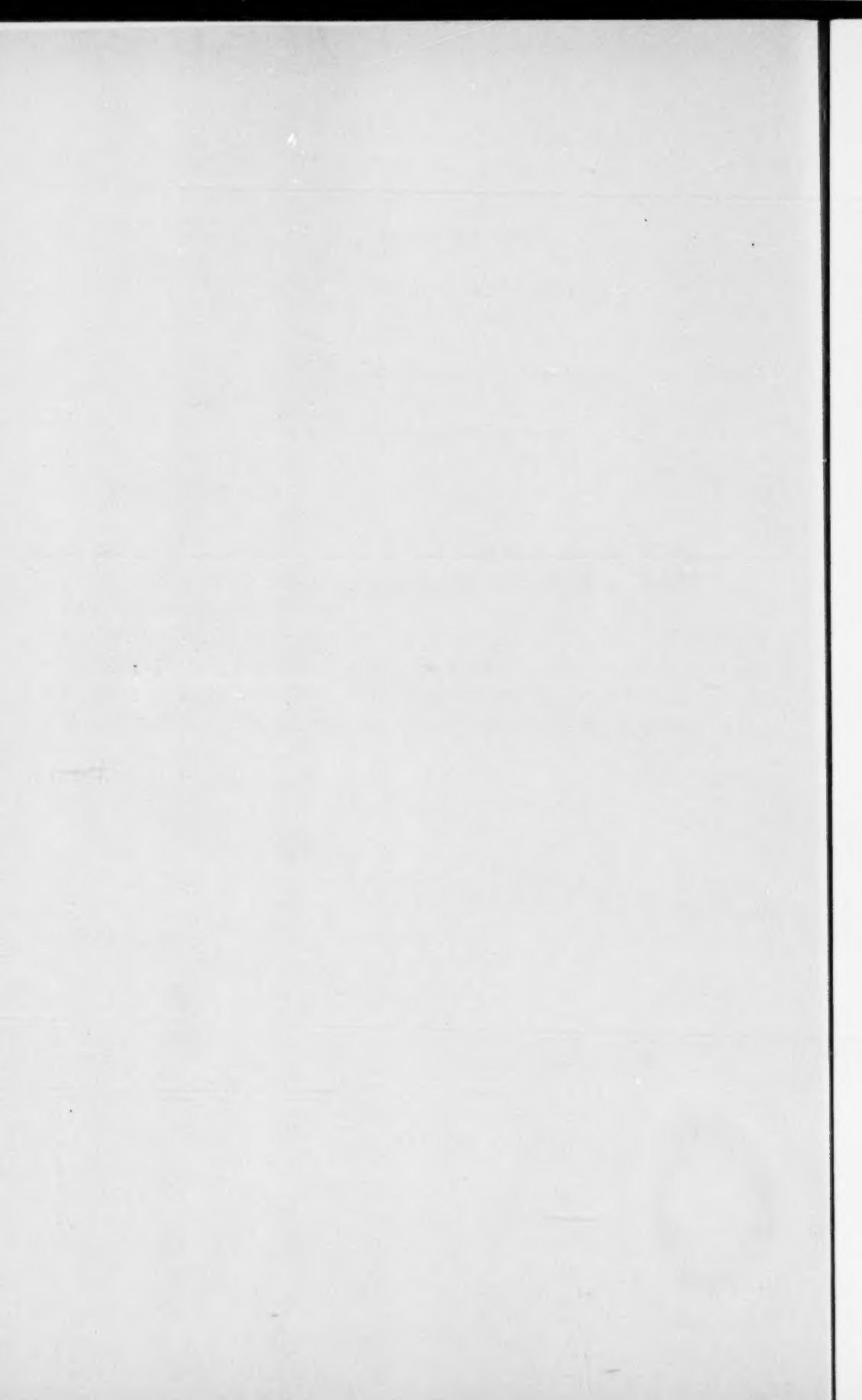
By Mary M. Shanklin,
Director
Office of Appeals

cc: Director, Region 31

Local Joint Executive Board of Las Vegas, Culinary Wkrs.
Union, Local 226 and Bartenders Union, P.O. Box 14396,
Las Vegas, Nevada 89114

Richard L. Mann, Esq., Rudin, Richman & Appel, 9601
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APPENDIX G



FEDERAL STATUTES INVOLVED

Section 2(9) of the National Labor Relations Act, as amended by the Labor-Management Relations Act of 1947, 29 U.S.C. §152(9), provides as follows:

“(9) The term ‘labor dispute’ includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.”

Section 3(d) of the National Labor Relations Act, as amended by the Labor-Management Relations Act of 1947, 29 U.S.C. §153(d), provides, in pertinent part, as follows:

“(d) [The General Counsel] shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be permitted by law.”

Section 7 of the National Labor Relations Act, as amended by the Labor-Management Relations Act of 1947, 29 U.S.C. §157, provides, in pertinent part, as follows:

“Section 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, . . . and shall also have the right to refrain from any or all such activities . . .”

Sections 8(a)(3) and (5) of the National Labor Relations Act as amended by the Labor-Management Relations Act of 1947, 29 U.S.C. §§158(a)3, 5, provides as follows:

Section 8. (a) It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of or any term or condition of employment to encourage or discourage membership in any labor organization . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

Section 301 of the National Labor Relations Act, as amended by the Labor-Management Relations Act of 1947, 29 U.S.C. §185, provides in pertinent part as follows:

"Section 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

No. 86-754

2

Supreme Court, U.S.

FILED

DEC 11 1986

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1986

ROYAL CENTER, INC.,

Petitioner,

VS.

LOCAL JOINT EXECUTIVE BOARD OF
LAS VEGAS, CULINARY WORKERS UNION,
LOCAL 226, AND BARTENDERS UNION,
LOCAL 165,

Respondents.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

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25.92

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No. 86-754

In the Supreme Court of the United States

October Term, 1986

ROYAL CENTER, INC.,

Petitioner,

VS.

LOCAL JOINT EXECUTIVE BOARD OF
LAS VEGAS, CULINARY WORKERS UNION,
LOCAL 226, AND BARTENDERS UNION,
LOCAL 165,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUPPLEMENTAL STATEMENT OF FACTS

RCI¹ and the Joint Board² were parties to a collective bargaining agreement which was effective, by its terms, from April 2, 1980 through and including April 1,

¹ Petitioner Royal Center, Inc.

² Respondent Local Joint Executive Board of Las Vegas.

1984, and thereafter if neither party moved to terminate. (Petition, Appendix D 4, para. 2). All the events concerning the suspension of operations by RCI, the sale of its business to a limited partnership it formed, and the resumption of operations by the limited partnership, occurred within the stated term of the agreement.

After operations were resumed in November, 1983, the Joint Board filed this action against RCI in December, 1983. (Petition, Appendix C 4). The Joint Board sought to compel arbitration of two grievances which were alternative in character. The first grievance was that RCI violated Section 29.02 of the agreement by selling its business without obtaining a written assumption of the agreement from the buyer. The second was that no bona fide, arms-length sale of the business had actually taken place, and that the business was being operated by 305³ as an alter ego of RCI. (*Id.*). 305 was not joined as a party, and no relief was sought as to it.

Section 29.02 of the collective bargaining agreement provides that in the event the employer sells or assigns his business, a condition to any such sale, assignment or transfer of ownership is that the employer will obtain from the successor or successors in interest a written assumption of the collective bargaining agreement. (Petition, Appendix D 4 para. 5).

As to the alter ego grievance, the preamble to the agreement states that it is made and entered into by and between the Joint Board and between the Joint Board and RCI, and RCI's successors and assigns. (Petition, Appendix D 4, para. 4).

³ 305 Convention Center Drive, LP.

ARGUMENT**I.****THE NINTH CIRCUIT ADHERED TO THE WELL-ESTABLISHED PRINCIPLES REITERATED IN AT&T**

As this Court stressed in *AT&T Techonologies, Inc. v. Communications Workers*, — U.S. —, 106 S.Ct. 1415 (1986), the principles it used to decide that case were “not new” (*Id.* at 1418): rather they had long ago been established in the *Steelworkers Trilogy*. The concurring Justices agreed that “we simply reaffirm established principles.” (*Id.* at 1422). All four principles reiterated by the Court were recognized and applied by the Court of Appeals in its decision on remand in the instant case.

First, this Court noted that “arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” *Id.* at 1418, citing *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). Second, the Court emphasized that “[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agree to arbitrate is to be decided by the court, not the arbitrator.” *Id.* at 1418, citing *Warrior & Gulf, supra*, and *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962), overruled in part on other grounds, *Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235 (1970).

This Court of Appeals found that it had two central issues before it: (1) “Did the arbitration clause survive the closure of RCI’s operations and termination of the collective bargaining agreement?,” and (2) “Do the

grievances fall within the scope of the arbitration clauses?" 976 F.2d 1159 at 1161-1162. The court stated that both issues were a matter solely of contract:

"Like the survivability issue, the question of the scope of the arbitration duty is 'a matter to be determined by the Court on the basis of the contract.' *John Wiley*, 376 U.S. at 547, citing *Atkinson v. Sinclair Refining Co.*, 370 U.S. 2328, 241 (1962)."

796 F.2d at 1162.⁴ This passage makes it amply clear that the court was adhering to the two connected principles reiterated in *AT&T*: a duty to arbitrate only arises as matter of contract, and it is for the courts to determine whether such a duty exists. The entire approach of the court's opinion was to determine whether RCI was bound by a contractual duty to arbitrate the grievances.

The Court of Appeal's opinion also strictly followed the *AT&T* Court's third and fourth principles: "[t]he courts have no business weighing the merits of the grievance;" and "there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *AT&T* at 1419 (citation omitted).

The Court of Appeals quoted exactly the same language as that quoted by this Supreme Court. 796 F.2d at 1162. Moreover, the citation was more than ritual:

⁴ It is notable that this Court in *AT&T* quoted the same passage from *Wiley*, and also cited *Atkinson*.

the opinion followed the presumption of arbitrability as to both survivability and scope. There was, and is no evidence—forceful or otherwise—of an intent by the collective bargaining parties to exclude these issues from arbitration. Indeed, this court found the very opposite to be true. As its opinion stressed, a contract clause requiring the employer to bind its successor to be labor contract would be meaningless if a closure extinguished the duty to arbitrate over a sale which violated this contract provision. Many if not most sales of businesses involve a period of shutdown in order to make the transition. Plainly the the parties intended that their contract be enforceable through arbitration after closure of the Employer's facility. *Id.* at 1163.

II.

THE ERROR COMMITTED BY THE SEVENTH CIRCUIT IN AT&T—ALLOWING THE ARBITRATOR TO DETERMINE THE SCOPE OF HIS OWN JURISDICTION—WAS NOT COMMITTED BY THE NINTH CIRCUIT

In *AT&T*, there was no issue of survival of contract provisions. Rather, the sole issue was the scope of the duty to arbitrate, in light of two contract clauses specifically addressing that issue. Both the district court and Seventh Circuit abdicated their roles, leaving the issue of arbitrability to the arbitrator.

By contrast, the Ninth Circuit squarely addressed the only question raised by RCI: whether its duty to arbitrate had been extinguished by plant closure. The court also squarely decided that the grievances fell within the scope of the arbitration clause, though RCI had not challenged this fact. Neither conclusion in any

way gave the labor arbitrator "the power to determine his own jurisdiction." *AT&T* at 1420 (citation omitted). Neither conclusion allowed the arbitrator "to impose obligations outside the contract limited only by his understanding and conscience." *Id.*

Nor did the court ignore "the function of a collective bargaining agreement as setting out the rights and duties of the parties." *Id.* Indeed, RCI's position in the instant case seeks to encourage the courts to commit this very error. RCI relied on naked policy arguments in asking the court to tear up a labor agreement because that agreement allegedly "saddles the new operation with an agreement ill fitting its operational needs." 796 F.2d at 1164. The Court of Appeals correctly refused to entertain such a challenge, adhering to this Court's focus on the collective bargaining agreement alone as "setting out the rights and duties of the parties." *AT&T* at 1420.

III.

THE LAW IS CLEAR THAT CLAIMS ARISING UNDER A COLLECTIVE BARGAINING AGREEMENT BUT BASED ON EVENTS OCCURRING AFTER EXPIRATION OF THE AGREEMENT ARE ARBITRABLE.

As the Court suggested in *Nolde Bros., Inc. v. Bakery and Confectionery Workers Union*, 430 U.S. 243, 97 S.Ct. 1067 (1977), the obligation to arbitrate issues arising from actions taken by an employer during the term of a collective bargaining agreement is so obvious that no one before this has questioned it. *Id.*, 430 U.S. at 249-250. There has, however, been considerable litigation of the more difficult question whether events

occurring *after* the termination of a collective bargaining agreement may give rise to arbitrable issues under the expired agreement. With the exception of the pre-Wiley case cited by RCI, *Fraser v. Magic Chef*, 324 F.2d 853 (CA6 1963), the answer has been uniformly affirmative. The result is that even if RCI is right that the suspension of its operations terminated the agreement (see section IV, pp. 11-14), it does not follow that issues arising from the subsequent sale or resumption of operations are not subject to arbitration.

In *Piano & Musical Instrument Workers, Local 2549 v. W. W. Kimball Co.*, 333 F. 2d 761 (CA7), reversed per curiam, 379 U.S. 357, 85 S.Ct. 441, 13 L.Ed.2d 541 (1964), the court of appeals held that because the collective bargaining agreement expired before the employer shut down its plant and moved operations to another state, union claims that employees' contractual seniority rights were violated when they were not transferred to the new plant were not arbitrable. This Court reversed and remanded, citing *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960), and *Wiley, supra*. Neither of the cases cited involved actions taken by an employer *after* the expiration of an agreement, so the import of *Kimball* was to extend the presumption favoring arbitration to such actions.

This approach was made very explicit in *Nolde Bros., supra*. The Court held that a union could compel arbitration of employee rights which it claimed were triggered by plant closure occurring *after* the expiration of the collective bargaining agreement. The Court could

see "no reason why parties could not if they so chose agree to the accrual of rights during the term of an agreement and their realization after the agreement had expired." *Id.* at 243, quoting *Wiley, supra*, 376 U.S. at 555. The claim that the Court ordered to be arbitrated in *Nolde* was that employees were due severance pay upon the closing of the employer's plant, in accordance with the terms of the expired collective bargaining agreement.

The Court held that the presumption of arbitrability extends to issues which are alleged to arise under the collective bargaining agreement, but which occur because of events after the termination of the agreement. This is true unless the arbitrability of such issues is "negated expressly or by clear implication" in the agreement. *Id.* at 252-253, 255. RCI points to no such exclusionary language in its collective bargaining, and there is none.

Nolde Bros. answers all of the questions raised by RCI here. To the extent it would distinguish *Nolde Bros.* by relying on the hiatus between the termination of the collective bargaining agreement and the subsequent actions about which the union complains, its arguments are turned back by the extensive work by the Court of Appeals for the Third Circuit in this area. *United Steelworkers of America v. Fort Pitt Steelcasting Division-Conval-Penn, Inc.*, 635 F.2d 1071 (CA3 1980), certiorari den., 451 U.S. 985, 101 S.Ct. 2319, 68 L.Ed.2d 843 (1981) was the first case in a series

presenting the issue of the arbitrability of claims concerning a plant closure occurring many months after termination of the collective bargaining agreement under which the claims are made. In *Fort Pitt*, the plant was closed nine months after the agreement terminated. *Id.* at 1074. The employer there, recognizing that under *Nolde Bros.*, "the parties must arbitrate claims that arise under the contract, but are based on events occurring after its termination" (*Id.* at 1075), attempted to distinguish *Nolde* by pointing to the lapse of time between the end of the contract and the plant closure. The Court of Appeals rejected this attempt, emphasizing that the union promptly made its claim after the event, the plant closure, giving rise to the claims. *Id.* at 1078. The court therefore ordered arbitration of six grievances covering such matters as severance pay, vacation pay, cancellation of retirees' life insurance coverage, deduction of social security benefits from retirees' pension benefits, and the refusal to pay supplemental unemployment benefits to terminated employees. *Id.* at 1074-1075. *Fort Pitt* was followed, in very similar situations, in *Steelworkers v. American Smelting, Inc.*, 648 F.2d 863 (CA3 1981) and *Federated Metals Corp. v. Steelworkers*, 648 F.2d 856 (CA3 1981). See also *United Rubber, Cork, etc. Workers v. Interco, Inc.*, 415 F.2d 1208 (CA8 1969); *Monroe Sander Corp. v. Livingston*, 377 F.2d 6 (CA2), certiorari den., 389 U.S. 831 (1967). Cf. *O'Connor Co., Inc. v. Carpenters Local 1408*, 702 F.2d 824 (CA9 1983) (labor dispute arose following termination of the agreement, but was not covered by the agreement).

Therefore, even assuming that RCI's suspension of operations in March, 1982 did terminate the collective bargaining agreement, that does not advance RCI's cause in the slightest. Like reemployment rights (*Kimball*), severance pay (*Nolde Brothers*), vacation, retirement and unemployment benefits (*Fort Pitt*), the right of employees to be protected against loss of their seniority, accrued longevity-based vacation rights and other rights and benefits under the collective bargaining agreement when a new owner takes over, is a bundle of rights which accrues under the agreement. When, after the assumed termination of the agreement with the Joint Board, RCI sold the business without requiring assumption of the agreement by the new owner, it arguably violated the employees' rights under the agreement, which is a matter for arbitration.

This situation is just the same as in *Nolde Bros*, *supra*, where the Court ordered arbitration of the question whether employees' rights to severance pay upon termination were violated when the business was closed and employees were terminated *after* expiration of the agreement. It is also the same as in *Fort Pitt*, *supra*, where the employer was ordered to arbitrate whether it violated a lengthy list of employee rights under a collective bargaining agreement when it closed its plant, even though the closure occurred nine months after the agreement terminated.

What RCI has attempted here would have many unfortunate consequences, which have been anticipated and repudiated by this Court. In *Nolde Bros.*, the Court stated:

“Any other holding would permit the employer to cut off all arbitration of severance-pay claims by terminating an existing contract simultaneously with closing business operations.”

Id. at 253. Here, RCI claims that plant closure *in itself* effects contract termination, and cuts off rights to arbitration. The Court has already blocked this easy avenue to escape from obligations to employees solemnly undertaken in the collective bargaining agreement. The way unblocked, any employer could escape its collective bargaining agreement whenever it wished, by the simple expedient of closing for some period of (RCI has *never* explained how long that should or must be), terminating its employees, and then taking actions prohibited by the agreement.

IV.

CESSATION OF OPERATIONS DOES NOT TERMINATE THE COLLECTIVE BARGAINING AGREEMENT.

A. Decisions Under Section 301 (a).

The only decision by this Court in which the question of plant closure during the term of a collective bargaining agreement is discussed in *John Wiley & Sons, Inc. v. Livingston, supra*. There, one book publisher with a union contract closed its plant as a result of a merger with a larger, non-union publisher. The merged company's employees were transferred to work in the surviving company's plant. The plant closure took place during the term of an existing collective bargaining agreement. Although the question in *Wiley* was whether the surviving company was obligated to arbitrate under

the merged company's agreement, the Court had the opportunity to discuss the effect of the changes on the agreement. The Court held that while the changes may have extinguished the duty to bargain, they did not have the same effect on the collective bargaining agreement. *Wiley*, 376 U.S. at 551, fn. 5.

Additionally, there is dictum in *Nolde Bros, supra*, that reveals clearly the views of the Court on this issue. The question in *Nolde* was whether a union could compel arbitration of its claims arising out of the closure of the employer's plant after the expiration date of the collective bargaining agreement. In the course of deciding this question, the Court considered what would happen if the closure occurred *prior* to the expiration of the agreement, and had this to say:

"There can be no doubt that a dispute over the meaning of the severance pay clause during the life of the agreement would have been subject to the mandatory grievance-arbitration procedures of the contract. Indeed, since the parties contracted to submit 'all grievances' to arbitration, our determination that the Union was 'making a claim which on its face is governed by the contract' would end the matter had the contract not been terminated prior to the closing of the plant."

Id. at 249-250. See *Wiley, supra*, 376 U.S. at 554 ("Claimed rights during the term of the agreement, at least, are unquestionably within the arbitration clause; . . .").

RCI does not discuss these critical aspects of *Nolde Bros. and Wiley*. It cites only *Fraser v. Magic Chef-Food Giant Markets, Inc.*, 324 F.2d 853 (CA6 1963) on this point. (Petition, p. 19). *Fraser* was decided before *Wiley*, and was manifestly contrary to the principles of *Warrior & Gulf, supra*, which was not mentioned by the court. It ruled on the merits of the grievance, and refused to compel arbitration because it regarded the grievance as lacking merit. This was, of course, an entirely improper, discredited approach. The Supreme Court was not requested to review the decision.

B. Decisions of the Labor Board

In *Steiner Trucraft, Inc.*, 237 NLRB 1079 (1978), enf'd without opinion, 87 Labor Cases para. 11,593 (CA3 1979), the Labor Board was faced with a situation where an employer negotiated a collective bargaining agreement, but closed its plant before the agreement was executed. The employer refused to either execute the collective bargaining agreement that had been negotiated, or to implement or abide by its terms. The Labor Board held that the plant closure did not affect the employer's obligation to abide by the collective bargaining agreement. The Board stated:

“As to Respondent's failure or refusal, after the closing of its facility, to continue to implement the terms and conditions of the January 13 agreement, it is well recognized that certain employee rights and benefits contained in a collective-bargaining agreement, i.e., severance pay, vacation pay, and pensions, are not automatically terminated by the expiration or ter-

mination of the contract. *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964). Similarly, a contractual duty to arbitrate is not automatically extinguished by the termination of the contract, and the parties to such a contract continue to have the duty to process grievances and arbitrate disputes that involve rights or benefits which accrue or vest during the contract's terms. *Nolde Brothers, Inc. v. Local No. 358 Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. 243 (1977)."

Id. at 1081.

V.

THE JOINT BOARD DOES NOT SEEK TO COMPEL ARBITRATION BY A NON-PARTY TO THE COLLECTIVE BARGAINING AGREEMENT.

The Joint Board does not seek to compel a non-party to the collective bargaining agreement to arbitrate any question under that agreement. The only party to this processed is RCI, which admits that it was a party to the agreement. The Union has not made 305 Convention Center Drive a party in this action.

The issue here is whether *RCI* should be compelled to submit to arbitration. The claim made by the Union is that RCI violated the collective bargaining agreement. This is parallel to *Howard Johnson Co. v. Detroit Joint Board*, 417 U.S. 249, 94 S.Ct. 2236, 41 L.Ed.2d 46 (1974). In *Howard Johnson*, there was a bona fide, arm's-length sale of personal property used in a hotel-restaurant business, and a lease by the seller to the

buyer of real property used in the business. The Union sought to compel arbitration of an alleged breach of the collective bargaining agreement by *both* the seller and the buyer, due to the buyer's refusal to adhere to the agreement or to hire many of the seller's employees. The seller in *Howard Johnson*, RCI's counterpart, admitted its obligation to arbitrate, and this was given by the Court as one of the reasons why the buyer should not be required to arbitrate. *Id.* at 253, 257-258.

The Union does not seek to show in arbitration, under either of its theories, that any entity separate from RCI is bound to RCI's agreement. The Joint Board's contentions are in the alternative, and both of them have to do with RCI itself.

The first theory is that RCI violated Section 29.02 of the collective bargaining agreement when it sold to 305 Convention Center Drive. This theory assumes the truth of what RCI claims is the nature of that transaction: an arm's-length *bona fide* sale. It is predicated not on any claim that 305 Convention Center Drive is obligated to the terms of the collective bargaining agreement, but rather on the claim that RCI should have required 305 Convention Center Drive to assume the collective bargaining agreement, and violated section 29.02 by not doing so.

The second, alternative claim is that *RCI* continues to conduct the business under the guise of a combination of itself and 305 Convention Center Drive. If the union's alter ego theory succeeds, and the arbitrator

finds that there has been no real change in the employing entity, then by definition there is no question of a new, different, unconsenting employer being held to the agreement. See *Howard Johnson, supra*, at 259, fn. 5. This case is utterly unlike *AT&T Information Systems v. Communications Workers Local 1300*, 797 F.2d 147 (CA3 1986), relied on so heavily by petitioner. There the union sought to compel a non-party to arbitrate. Furthermore, no allegation was made of alter ego status.

VI.

THE DECISION OF THE NLRB'S GENERAL COUNSEL NOT TO ISSUE A COMPLAINT IS AN EXERCISE OF PROSECUTORIAL DISCRETION NOT ENTITLED TO ANY ISSUE-PRECLUSIVE EFFECT.

As a general rule, decisions of a tribunal are given issue-preclusive effect only as to issues which have been fully and fairly litigated by the interested parties. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 332, 99 S.Ct. 645, 58 L.Ed. 2d 552 (1979). In the procedure of the National Labor Relations Board, the decision to dismiss an unfair labor practice charge is not the culmination of litigation, but rather is a determination that there will be no litigation. It is established that such a decision has no issue-preclusive effect. *Miller Brewing Co., v. Brewery Workers Local Union No. 9*, 739 F.2d 1159 (CA7 1984); *Edna H. Pagel v. Teamsters, Local 5995*, 667 F.2d 1275, 1279-81 (CA9 1982); *United Steelworkers of America v. Fort Pitt Steelcasting Division-Conval-Penn, Inc.*, 635 F.2d 1071, 1080 (CA3 1980), certiorari den., 451 U.S. 985, (1981); *Paramount Transportation*

System v. Teamsters, Local 150, 436 F.2d 1064 (CA9 1971). The decision not to issue a complaint is simply the exercise of prosecutorial discretion. *Miller Brewing Co.*, *supra*.

In the procedure followed by the National Labor Relations Board, when an unfair labor practice charge is filed it is investigated administratively by the Regional Director in whose area the charge arose. The Regional Director acts as the delegate of the Board's General Counsel. The General Counsel is the Board's prosecutorial arm. 29 C.F.R. Sections 202, 203.1. Evidence concerning an unfair labor practice charge is taken by the Regional Director from the charging and charged parties privately. There is no opportunity to hear the opposing party's evidence, much less to confront and cross-examine witnesses. There is no opportunity to subpoena witnesses or documentary evidence. The charged party is not even obligated to cooperate with the Regional Director's investigation. 29 C.F.R. Section 101.4; NLRB Casehandling Manual Sections 10056, 10058.

The decision of the Regional Director may be appealed to the General Counsel. It is established that the General Counsel has wide prosecutorial discretion, and the decision whether or not to issue complaint is not judicially reviewable. *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).

The decision of an NLRB Regional Director not to issue complaint is no different, and is entitled to no

greater weight, than a decision not to prosecute made by a district attorney, the United States Attorney, the Federal Trade Commission, etc.

In this case, the General Counsel decided not to issue a complaint on the charges filed by the union contemporaneously with the filing of this action. There was no hearing, only an administrative investigation culminating in an exercise of prosecutorial discretion. The General Counsel, through the Regional Director, gave reasons for the decision not to issue complaint, which is typical, but did not and could not make any findings on issues of fact or law fully and fairly litigated between the parties.

There is not the conflict or confusion on this point that RCI suggests. Some cases have held that the refusal to issue complaint, while not issue-preclusive, may be given evidentiary weight. *Smith v. Local 25, Sheet Metal Workers International Association*, 500 F.2d 741 (CA5 1974); *Thomas v. Consolidated Co.*, 380 F.2d 69 (CA4 1967). In the principal case relied upon by RCI for the proposition that there is conflict, *Carpenters Local 1478 v. Stevens*, 743 F.2d 1271, 1278-1279 (CA9 1984), an entirely different question was presented. In *Stevens*, the issues deemed precluded were decided by the Labor Board after a representation hearing, in which the parties had the opportunity to, and apparently did, fully and fairly litigate the issues. Therefore, it is fully distinguishable from this case on a point of fundamental legal significance.

RCI's effort to induce a departure from settled doctrine in this case is based on erroneous concepts. It repeatedly suggests in its petition, while never saying it straightforwardly, that the Joint Board is somehow bound to the General Counsel's point of view by an election of remedies. But "whether particular conduct constitutes an unfair labor practice is a distinct question from whether [an employer] must arbitrate a grievance resulting from such conduct." *United States Steelworkers of America v. Fort Pitt*, *supra* at 1080.

Labor Board proceedings and contractual arbitrations are governed by completely different sources of law. The Labor Board proceedings are, of course, governed by the Labor Management Relations Act. But arbitrations are, and must be, governed by the private law of the parties' collective bargaining agreement. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). The interpretation and enforcement of such agreement is entrusted to the courts, not the Board. *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 427 (1967).

Here, the Board's General Counsel decided not to pursue a complaint to impose upon RCI or 305 a continuing obligation to bargain with the Joint Board. Contrary to RCI's suggestion, the General Counsel did *not* purport to free RCI from its obligations under the existing collective bargaining agreement. (See Petition, Appendices E and F). Thus, RCI's suggestion of an intolerable conflict is unfounded. The issues before the

NLRB and arbitration are superficially similar, but the governing sources of law are different. This is not forum shopping, for the Joint Board has pursued *independent* rights in the proper forum for each.

This is also not a case of a disappointed litigant turning to a different forum. The Joint Board pursued its separate remedies simultaneously, and in fact won in the District Court before it lost its appeal to the General Counsel.

VII.
CONCLUSION

The petition should be denied.

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Respectfully submitted,

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